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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 132.

THE NATOMA WATER AND MINING COMPANY, PLAINTIFF IN ERROR,

vs.

B. N. BUGBEY.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

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FILED SEPTEMBER 24, 1875.

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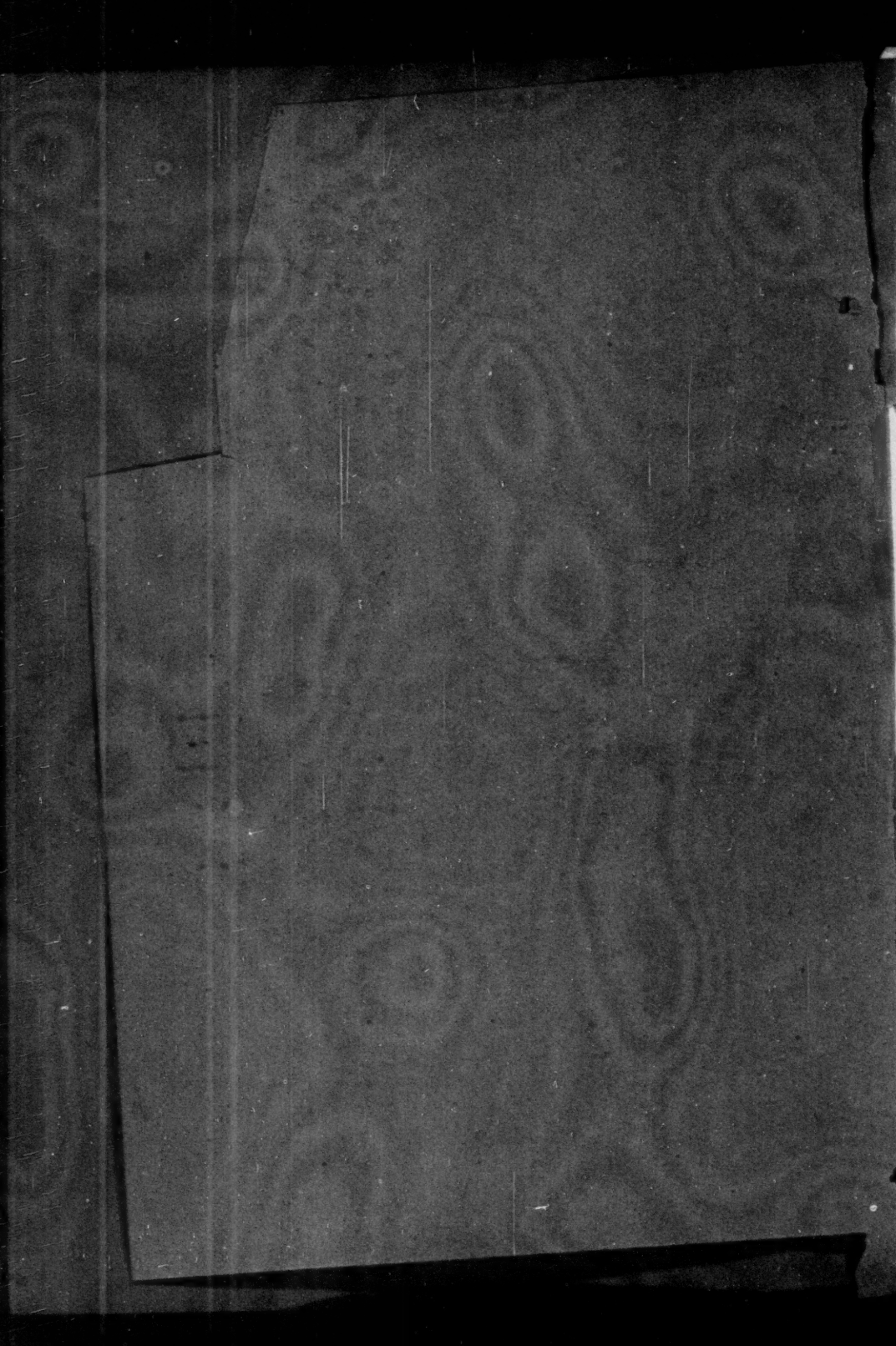
Dismissed
Each Party to pay



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a STATE OF CALIFORNIA:

B. N. BUGBEY, PLAINTIFF AND RESPONDENT,
vs.
THE NATOMA WATER AND MINING COMPANY,
defendant and appellant.

Petition for writ of error.

To the Hon. William T. Wallace, chief-justice of the supreme court of the State of California:

The petition of the Natoma Water and Mining Company, a corporation duly incorporated and organized under the laws of the State of California, respectfully represents:

That heretofore, to wit, on the sixteenth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, an action, wherein B. N. Bugbey was plaintiff, was commenced in the district court of the eleventh judicial district of the State of California, in and for the county of El Dorado, against this petitioner as defendant therein, wherein the plaintiff, by his complaint then filed, as well as by
b his amended complaint filed on the 14th day of June, A. D. 1872, alleged that on the 17th day of October, A. D. 1866, he was seized in fee and entitled to the possession of, and so continued to be and was at the time of the commencement of said action seized in fee and entitled to the possession, as owner, of certain real estate situated in the County of El Dorado, in the State of California, and that this petitioner, the defendant aforesaid, on or about the day of , A. D. 1866, unlawfully entered upon a portion of said premises and ousted the plaintiff therefrom, and wrongfully withheld the possession thereof from said plaintiff.

Whereupon the plaintiff prayed judgment against this petitioner for possession of said real estate and for damages and costs.

And thereupon, on the 18th day of October, A. D. 1872, this petitioner appeared and answered to said amended complaint, and among other things averred in defense to said action that while said lands described and claimed in said plaintiff's complaint were public lands of the United States, and subject to the act of the Government
c thereof, this petitioner secured from the said Government a grant to enter upon the same and to locate and construct a canal, and to use, occupy, and possess the same, and so much of said lands under and on each side of the same as was necessary for the proper use, operation, and management of said canal, and that all the premises claimed by the said plaintiff are necessary and indispensable for the use and operation of said canal, and that said grant had never been revoked or annulled, but, on the contrary, had been expressly acknowledged and affirmed by the act of Congress approved July 26th, A. D. 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes."

And this petitioner, for a further defense, claimed right to the said premises demanded by the said plaintiff under and by virtue of an act of Congress, approved on the 3rd day of March, A. D. 1853, entitled "An act to provide for the survey of the public lands in California, the
d granting of pre-emption rights therein, and for other purposes."

And thereupon, on the 8th day of April, A. D. 1873, a judgment was rendered in and by said district court against this petitioner, and in favor of said plaintiff, wherein it was ordered, adjudged, and de-

creed that the said plaintiff do have and recover of and from this petitioner the premises demanded from him in said action, and also the sum of $59.00 for accruing rents and profits of said premises, together with his taxed costs.

That on the 19th day of May, A. D. 1873, this petitioner duly perfected an appeal from the said judgment of the said district court, and also from the order of the said court denying the petitioner's motion for a new trial therein, to the supreme court of the State of California; that the said supreme court then was and still is the highest court of the State of California in which a decision in said suit could be had.

That on Friday, the 30th day of April, A. D. 1875, the said
e supreme court rendered its final judgment in said cause, in all things affirming the judgment of said district court.

That the petitioner is desirous of having said last-mentioned judgment and decision reviewed by the Supreme Court of the United States.

That in said action, and on said appeal to the said supreme court of California, the petitioner claimed a right, title, and privilege to said demanded premises under two statutes of the United States, that is to say, under an act of Congress approved on the 26th day of July, A. D. 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," and under an act of Congress approved on the 3rd day of March, A. D. 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," under both of which said acts of Congress this petitioner specially set up and claimed title, right, and privilege in and to said demanded premises,

and that the final judgment of the said supreme court of the State
f of California, then and there and still being the highest court of said State in which a decision in said suit could be had, was against the said title, right, and privilege of this petitioner, specially set up and claimed by virtue of the statutes of the United States aforesaid, and the proper construction thereof.

All of which more fully appears by a copy of the record of the proceedings in said cause, which is herewith submitted for your honor's information.

Wherefore this petitioner prays that a writ of error and citation may issue to the said supreme*e* court *court* of the State of California and the judges thereof, commanding that, under the seal of said supreme court, they distinctly and openly send the records and proceedings in the action aforesaid, with all things concerning the same, to the Supreme Court of the United States.

And that all further proceedings in said cause in said supreme court of the State of California be stayed.

C. G. W. FRENCH,
Attorney for Petitioner.

g The above petition is allowed.

WM T. WALLACE,
Chief-Justice.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you,

between the Natoma Water and Mining Company, plaintiff in error, and B. N. Bugbey, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this seventh day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.]

L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Dist. of California,
By J. F. O'BEIRNE,
D'y Clk.

The above writ of error is hereby allowed.

W'M T. WALLACE,
Chief-Justice of the Supreme Court of the State of California.

(Indorsed:) 3856. United States Supreme Court. Natoma Water and Mining Company, pl'ff in error, vs. B. N. Bugbey, def't in error. Writ of error. Filed May 10th, 1875. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

2 *Return to writ of error.*

The answer of William T. Wallace, chief-justice of the supreme court of the State of California, to the foregoing writ: The record and process, whereof mention is therein made, follow, in these words, to wit:

In the supreme court of the State of California.

BENJAMIN N. BUGBEY, PLAINTIFF AND RESPONDENT, *v.* NATOMA WATER AND MINING COMPANY, DEFENDANT AND APPELLANT.	No. 3857.

Transcript on appeal. Filed June 28th, 1875.

GRANT I. TAGGART,
Clerk,
By ALLEN TILLINGHAST,
Deputy.

3 In the supreme court of the State of California.

In the district court of the eleventh judicial district of the State of California, in and for the county of El Dorado.

B. N. BUGBEY, PLAINTIFF AND RESPONDENT, v. NATOMA WATER AND MINING COMPANY, defendant and appellant. } No.

Complaint.

B. N. Bugbey, the plaintiff, by Robert and E. I. Robinson, his attorneys, complains of the Natoma Water and Mining Company, an incorporation duly incorporated and organized, and acting under the laws of the State of California, and for cause of complaint avers that heretofore, to wit, on the 17th day of October, A. D. 1866, the said plaintiff was seized in fee and entitled to the possession of, and from thence
4 hitherto has been and still is the owner of, in fee, and entitled to the possession of the following-described real estate, situated in the county of El Dorado and State of California, and known and described as the south half of section number sixteen, and the northeast quarter of the northwest quarter of section number twenty-one, all in township number ten north of range number eight east of the Mount Diablo base and meridian.

And that afterwards, to wit, on the 1st day of December, A. D. 1866, said defendant unlawfully entered upon a portion of said premises, described as follows, to wit: a tract of land ten feet wide running across the south half of section sixteen, and the northeast quarter of northwest quarter of section twenty-one, township ten north, range eight east, Mount Diablo base and meridian aforesaid, (the center of said tract being the center of the defendant's ditch, commonly known as the Natoma Ditch,) and ousted plaintiff therefrom, and still wrongfully and unlawfully withholds the possession thereof from plaintiff, to the damage of plaintiff in the sum of two hundred and forty dollars. That the value of the monthly rent and profits of said premises is ten dollars per month.

Wherefore plaintiff prays judgment against said defendant for the possession of the said real estate, and that he forthwith deliver
5 the same to plaintiff; and for the said sum of five hundred dollars damages for withholding the possession of said premises from said plaintiff, and for the monthly rents and profits as aforesaid, and costs of suit, and for such further relief as plaintiff may be entitled to under the facts proved.

ROBERT ROBINSON,
E. I. ROBINSON,
Attorneys for Plaintiff, No. 60 K street, Sacramento, Cal.

Filed April 16th, 1868.

W. N. MUFFLEY, *Clerk.*

Demurrer.

(Title of court and cause.)

Now comes the said Natoma Water and Mining Company, the defendant herein, appearing and defending in the above-entitled action by C.

G. W. French, its attorney, and demurs to the complaint of the said plaintiff filed herein, on the following grounds:

First. For that the said complaint is ambiguous, unintelligible, and uncertain in this, to wit:

1st. That the real property sued for in this action is not described with its metes and bounds in the said complaint.

6 2d. Because it does not appear from the face of said complaint that plaintiff was ever in possession of the property sued for, or that defendant ever was in possession thereof.

3d. For that in one portion of said complaint plaintiff's damages are averred to be two hundred and seventy dollars, and in another portion said damages are claimed to be five hundred dollars; and in one portion of said complaint defendant is alleged to be a corporation—in another a person.

Second. For that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays to be hence dismissed with its costs.

C. G. W. FRENCH,
Attorney for Defendant.

Filed October 22, 1869.

W. N. MUFFLEY, *Clerk*,
By W. H. HILL, *Deputy.*

Order of substitution of attorneys and confession of demurrer.

(Title of court and cause.)

On this cause being called for a hearing, Geo. G. Blanchard, (appearing as counsel for defendants by stipulation on file herein and

7 order of the court,) Geo. E. Williams, and G. J. Carpenter were substituted attorneys of record for plaintiff.

Demurrer on file herein of defendants was confessed, and twenty days granted plaintiff in which to file amended complaint.

Filed May 29th, 1872.

R. O. TURNBULL, *Clerk.*

Amended complaint.

(Title of court and cause.)

Now comes the above-named plaintiff, and for an amended complaint herein says:

That said defendant, the Natoma Water and Mining Company, is a corporation duly incorporated and organized under the laws of the State of California.

And for cause of action against said defendant, plaintiff avers that heretofore, to wit, on the 17th day of October, 1866, the said plaintiff was seized in fee and entitled to the possession of, and from thence hereto has been, and still is, the owner of in fee and entitled to the possession of the following-described real estate, situated in the county of El

Dorado, and State of California, and known and described as the

8 south half of section number sixteen, and the northeast quarter of the northwest quarter of section number twenty-one, all in township number ten (10) north, of range number eight east, Mount Diablo base and meridian.

And that afterwards, to wit, on the day of , 1866, said defendant unlawfully entered upon and took possession of a portion of said premises described as follows, to wit, all that certain tract of land ten feet in width and about 84.65 chains in length, which includes the bed and banks of that certain canal called the Natoma Water and Mining Company's Canal, and more particularly described as follows, to wit, commencing at the point where the dividing line between the northwest quarter and the southwest quarter of said section sixteen crosses the said Natoma Water and Mining Company's Canal, about eight hundred and thirty chains west of the center of said section sixteen, and running thence southerly, following the meanderings of said canal, and always maintaining the same breadth of ten feet; the center of said tract being the center of said canal, through the south half of said section sixteen, a distance of about $80\frac{40}{100}$ chains to the point where the dividing line between said sections sixteen (16) and twenty-one crosses said canal, thence following the meanderings of said canal, and
9 always maintaining the same breadth of ten feet, the center of said tract being the center of said canal, through the northeast quarter of northwest quarter of said section twenty-one, a distance of about $4\frac{15}{100}$ chains to the point where the dividing line between the lands of Henry Mettel and plaintiff crosses said land, together with all the appurtenances, and ousted plaintiff therefrom, and still wrongfully and unlawfully retain possession and withhold the possession thereof from plaintiff, to the damage of plaintiff in the sum of two hundred and forty dollars.

And he further avers that the value of the monthly rents and profits of said premises is ten dollars per month.

Therefore, plaintiff prays judgment against said defendant for the possession of said real estate, and for said sum of two hundred and forty dollars damages for withholding the possession, and for the monthly rents and profits up to the entry of judgment at ten dollars per month, costs of suit, and such further relief as he may be entitled.

G. J. CAPENTER AND
GEO. E. WILLIAMS,
Attorneys for Plaintiff.

Filed June 14th, 1872.

R. O. TURNBULL, *Clerk*,
By E. W. WHITMER, *Deputy.*

10 *Demurrer to amended complaint.*

(Title of court and cause.)

Now comes the asid Natoma Water and Mining Company, the defendant in the above-entitled cause, by C. G. W. French, its attorney, and demurs to the amended complaint of said plaintiff filed herein on the 14th of June, 1872, on the following grounds:

First. For that said amended complaint is ambiguous, unintelligible, and uncertain in this, to wit:

I. For that the real property sued for in this action is not described with its metes and bounds in said amended complaint.

II. For that the description of said premises is unintelligible and ununcertain in this portion, "the center of said tract being the center through," etc.

III. For that it is not averred in said complaint whether or not de-

fendant has continuously held said premises, or held, possessed, or withheld the same for any specified time, or for any time.

IV. That the description of the said premises is otherwise defective.

11 Second. For the said complaint does not state facts sufficient to constitute a cause of action. Wherefore defendant prays to be hence dismissed with its costs.

C. G. W. FRENCH,
Attorney for Defendant.

Service of within demurrer made on us by copy this 24th day of June, 1872, after filing.

GEO. E. WILLIAMS AND
G. J. CARPENTER,
Attorneys for Plaintiff.

Filed June 24th, 1872.

R. O. TURNBULL, *Clerk.*

Order overruling demurrer to amended complaint.

(Title of court and cause.)

Now on this day this cause being called for a hearing on defendant's demurrer to plaintiff's amended complaint, Geo. E. Williams and G. J. Carpenter appearing as counsel for plaintiff, and C. G. W. French for defendant, after argument of counsel, the court overruled the demurrer; defendant duly excepted, and ordered that defendant's counsel be served with a corrected copy of plaintiff's amended complaint, and that
12 said defendant file his answer within three days after receiving said corrected copy. By consent of parties it was agreed that defendant did not waive his demurrer by filing said answer, and this cause was set for trial on Monday, December 2d, 1872, at the hour of 10 o'clock a. m., defendant's counsel giving notice that he would then move for a continuance of the cause.

Answer to amended complaint.

(Title of court and cause.)

And now comes the above-named defendant, the Natoma Water and Mining Company, by its attorney, C. G. W. French, and answering the amended complaint of the said plaintiff herein, filed June 14th, 1872, expressly denies generally and specifically all, every, and each of the allegations in said amended complaint; wherefore, defendant prays judgment against plaintiff.

Defendant further answering, and for a separate defense, avers that in the years 1851 and 1852, while the lands described in said complaint were public lands of the United States, defendant under grant of said United States entered upon said [land,] surveyed and located the line of the canal mentioned in said complaint, and excavated
13 and constructed said canal on the tract of land secondly described in plaintiff's said complaint as follows, to wit: "All that certain tract of land ten feet in width and about 84.65 chains in length, which includes the bed and banks of that certain canal called the Natoma Water and Mining Company's Canal," being the land claimed by plaintiff from defendant in this action, and then and there under

said grant took possession of said tract last mentioned and described, and has ever since continuously, without interruption, held and maintained actual exclusive occupation and possession of said tract of land adversely to plaintiff, and all other persons and parties claiming the same as the owner thereof during all the time since the location of the line of its said canal thereon; that the canal aforementioned is a part or section of the Natoma Water and Mining Company's mining canal or ditch, which was located and constructed as aforesaid in the years 1851 and 1852 by defendant for the purpose of supplying water to miners for mining purposes, and to others for other purposes; that the same extends from its dam on the South Fork of the American River a short distance above Salmon Falls, in the county of El Dorado, southwesterly along and over mineral gold-bearing lands to Farmer's Diggings, in the county of Sacramento, supplying by its main and branches many
14 mining camps and locations between these termini. That ever since its construction it has been continuously used for the purposes aforesaid in conveying the water from said river, which defendant has sold for the use and purposes aforesaid and for irrigation, and has realized large gains and profits therefrom.

Defendant further answering and for a separate defense avers that while said lands first described in said complaint were public lands of the United States and subject to the act of the Government of said United States, defendants received from said Government of the United States a grant to enter upon the same and to locate and construct said canal, and to use, occupy, and possess the same, and so much of said lands under and on each side of the same as was or is necessary for the proper use, operation, and management of the same, and that all of the tract secondly described in plaintiff's complaint as covered by the bed and banks of said canal, being ten feet in width, the center of said ditch being the center of said tract, etc., is necessary and indispensable for the use and operation of said canal; and that said grant has never been revoked or annulled, but has since been expressly acknowledged and affirmed by the public act of said Government, approved July 26th, 1866.

Defendant further answering for a separate defense avers that
15 while all the lands described in complaint (plaintiff's) were public lands of the United States, the Government of the United States granted, acknowledged, and affirmed to defendant the perpetual right of way for said canal and its banks, and sufficient land on either side of its banks for the convenient use, operation, and control of the same, and the perpetual right to use, possess, and enjoy said canal thereon; and that all the tract secondly described in plaintiff's complaint, and claimed by defendant in this action, is necessary for the use of said canal, and that said affirmation was made by an act of the Congress of the United States, which is a public act.

Defendant further answering and for a separate defense avers that neither the plaintiff, his ancestor, predecessor, or grantor had been possessed or seized of the tract of land sought to be recovered in this action within fifteen years before the commencement of this action.

Defendant further answering and for a separate defense avers that for more than fifteen years before the commencement of this action the defendant has been in the continued, uninterrupted, absolute, exclusive, peaceable, adverse possession of the tract of land secondly described in plaintiff's complaint, and sought to be recovered in this action, to wit, the land covered by said canal and its banks, claiming to own the same; and the plaintiff had full knowledge of defendant's possession and

16 claim of ownership of the same, and during all that time, since the construction of said canal thereon, fully acquiesced in defendant's said ownership and possession thereof, and defendant's vested and accrued rights to the possession of said tract of land, and the said canal and waters therein; and the right to use the same for the purposes of mining, agriculture, and other purposes, have, during all the time last aforesaid, been fully acknowledged and recognized by the local customs, laws, and decisions of the courts of this State; and unless defendant be maintained and protected in the use, possession, and enjoyment of the same, defendant's whole canal, work, improvements, and property will be rendered totally valueless and be destroyed.

And defendant avers that the tract of land sued for in this action and covered by defendant's canal is mineral land, containing mines of gold, and located in the mineral and mining localities of the State.

And for a further defense defendant avers that in the years 1851 and 1852 defendant entered upon the lands mentioned in the complaint by grant of the Government of the United States; that said lands were at that time public mineral lands of the United States, entirely vacant, unoccupied, and unclaimed by any person or party, and defendant

17 then excavated and constructed said canal mentioned in complaint, and ever since that time has continuously, and without any interruption, held, used, and operated the same for the purposes of furnishing water to miners, agriculturists, and others for mining, irrigating, and other purposes; that said canal covers the whole of the tract of land sought to be adjudged to plaintiff in this action; that said grant aforementioned has never been revoked, but since expressly acknowledged and affirmed, as is in this answer before set forth; that during all the time since the construction of said canal defendant has been in the exclusive adverse occupancy and possession of the said tract of land occupied by the same; that many years subsequent to defendant's entry and occupancy on section sixteen, mentioned in the complaint, and before the survey of said section, and prior to March, 1854, settlements were made and dwelling-houses erected on said section, and portions of the same were cultivated and pre-emption rights claimed; but defendant's rights were always recognized and acknowledged by all such settlers and by plaintiff, and that all the facts in this answer heretofore set forth were well known to plaintiff.

And defendant further avers that so far as plaintiff claims the lands sued for in this action, to wit, that portion located within said

18 section sixteen, through the State of California, and proceedings before officers of said State, or of any county thereof, that the same is void for fraud as against defendant's rights in the said premises. That said proceedings were conducted secretly and in fraud of defendant's vested rights in the said premises, and intended to cloud and impair defendant's said rights therein. That the affidavits of plaintiff in said proceedings represented that there was no valid claim nor any improvements other than those owned by plaintiff on said lands. That some of said proceedings seem to be antedated. That said proceedings were had ostensibly under the provisions of an act entitled "An act to provide for the sale of certain lands belonging to the State." That defendant had been a permanent occupant and claimant of said premises at the time of said proceedings for more than thirteen years, and then was such occupant and claimant as hereinbefore set forth. Yet no notice was ever given to defendant by the locating agent, as in said act provided, nor by any other person whatever, and neither plaintiff nor any other person or party whatever ever claimed or demanded said

premises or any part thereof of defendant before the commencement of this suit.

Wherefore, defendant having fully answered, prays that the action may be dismissed, and that defendant be adjudged to go hence without day, and have judgment against plaintiff for its costs in this behalf most wrongfully sustained, and for such other or further relief, judgment, or decree as may be equitable and just in the premises.

C. G. W. FRENCH,
Attorney for Defendant.

Filed October 18th, 1872.

R. O. TURNBULL, *Clerk*,
By E. W. WHITMER, *Deputy Clerk.*

First bill of exceptions.

(Title of court and cause.)

Be it remembered that on the 10th day of February, A. D. 1873, the first day of the regular February term of said court of said year, the plaintiff appearing by his attorneys, Geo. E. Williams and G. J. Carpenter, and the defendant appearing by its attorneys, C. G. W. French and Geo. G. Blanchard, and the plaintiff asking to have said cause set down for trial at said term, the said defendant, through its said attorneys, move the court to continue said cause for the term on a certain stipulation on file in said cause, which is in words and figures following, to wit:

"It is hereby stipulated that this case be continued from term to term until fifteen days' notice of trial by either party before the term of court set for trial.

"ROBERT ROBINSON,
"*Attorney for Plaintiff.*
"C. G. W. FRENCH,
"*Attorney for Defendant.*"

(On the back of which stipulation is the following indorsement, to wit:) Filed November 14th, 1872. R. O. Turnbull, clerk.

And also on the affidavit of C. G. W. French, filed in said cause in said court on the 18th day of November, 1872, and marked "Affidavit A."

On said motion for such continuance it is admitted that no notice of trial has ever been given by either party, except the notice attached to and mentioned in said affidavit A, other than that given by plaintiff through his said attorneys, Williams & Carpenter, by their application and efforts in open court, at the November term of said court for the year 1872, in presence of said French and Blanchard, appearing at that time for said defendant, to have said cause set down for trial at said November term of said court. It further appears from the papers on file and from the records of said court of said cause that a notice was, on the 9th day of May, 1872, served upon said French, as one of the attorneys of said defendant, informing him and said defendant that the said Geo. E. Williams and the said G. J. Carpenter had been substituted as the attorneys of said plaintiff for and in the place of Robert and E. I. Robinson; and the said notice of such substitution, with service duly acknowledged by said C. G. W. French, attorney of said defendant, was on the 29th day of May, A. D. 1872, filed among the papers in said cause by the clerk of said court, where it has ever since remained.

It further appears from the papers on file in said cause, and from the records thereof in said court, that on the 19th day of November, 1872, at the November term of said court *from* the year A. D. 1872, on plaintiff's motion the said cause was set down for trial on December 2d of said year of said November term of said court; and that on the 29th day of November last mentioned the defendant moved the court for a continuance of said cause for the term, basing its motion on affidavit A, and other affidavits therewith filed, which affidavits last mentioned, among other things, recited and proved to the court the defendant's inability to proceed to the trial of said cause on account of the absence of material and necessary witnesses, whose attendance or whose depositions said affidavit showed could be procured at the February term of said court for the year 1873; which said motion was resisted by said plaintiff, through his attorneys, but allowed and granted by
22 the court solely on account of such absence of said material witnesses in said affidavit mentioned; and the said cause was then continued for the term.

Now, on this said 11th day of February, 1873, the said motion of said defendant for a continuance of said cause is refused and disallowed, and the said cause ordered for trial on Friday, the 21st day of February, 1873, to which ruling and order of said court the defendant duly excepted, alleging the same as error of law.

Dated February 10th, 1873.

A. C. ADAMS, *Judge.*

Filed February 10th, 1873.

R. O. TURNBULL, *Clerk.*

Order refusing continuance, etc.

(Title of court and cause.)

Now, on this day this cause coming on regularly for trial, Geo. E. Williams and J. G. Carpenter appearing as counsel for plaintiff, and C. G. W. French and Geo. G. Blanchard for defendant, whereupon counsel for defendant moved for a continuance on affidavits heretofore filed and statement of counsel. After argument, said motion was overruled,
23 defendant excepting; and H. T. Knight, B. N. Bugbey, E. A. Jones, Brown and James Crawford, and Henry, witnesses on the part of the plaintiff, were sworn and examined; whereupon counsel for defendant moves the court for a nonsuit. After argument of counsel, said motion was submitted, and by the court taken under advisement. This cause was tried before the court, sitting without a jury, a jury being expressly waived by both parties to this action.

February 24th, 1873.

A. C. ADAMS.
District Judge.

Whereupon the court makes the following findings of fact:

Findings of fact.

(Title of court and cause.)

In this case the court finds as its findings of fact as follows, to wit:

First. That the defendant, the Natoma Water and Mining Company, is and was at the commencement of this action a corporation under the laws of the State of California.

Second. That in the early part of the year 1851 the line of the canal mentioned in the pleadings was surveyed and located on the lands sought to be recovered in this action, and that during the years 1851 and 1852 was being excavated by the defendant, and that the
24 canal was completed through said lands about the 1st of April, 1853, and has ever since been continuously used and possessed by defendant for running water therein; that the land over and through which said canal was constructed was vacant, unclaimed public land of the United States Government.

Third. That said canal was constructed on said land in accordance with the customs of the locality, for conveying water for mining, agricultural, and mechanical purposes from the South Fork of the American River, at its dam about one and one-half miles above Salmon Falls, in the county of El Dorado, through mineral lands in some places, and agricultural lands in others, to Farmer's Diggins, in the county of Sacramento, and to numerous other localities.

Fourth. That the said canal is about twenty-five miles in length, with several branches, and ever since its construction has been claimed by the defendant as property, and so continuously held and used. That the premises described in plaintiff's complaint were, at the time the said canal was located and constructed, and for a long time thereafter, public lands belonging to the Government of the United States.

Fifth. That the defendant took up, located, and appropriated the line of said canal in accordance with the local customs, laws, and de-
25 cisions of the courts of the State of California, to secure the right to convey the waters of said South Fork of the American River upon, over, through, and across said premises to the points, localities, and for the purposes aforementioned; and that the right to the use of said waters and canal for conveying the said waters, was acquired and used for so conveying them for the purposes aforementioned.

Sixth. That said canal was constructed at a cost of about four hundred thousand dollars, and that the right of said defendant to the use of the said waters, and the line of canal thus constructed, from the time of its construction, was never disputed until the commencement of this action.

Seventh. That the defendant is now, and since the construction of said canal has been, the owner and possessor of the right to the use of the water flowing in and through said canal.

Eighth. That for more than fifteen years before the commencement of this action the part or portion of the lands described in plaintiff's complaint as passed over and occupied by said canal of defendant was in the continued, uninterrupted, absolute, peaceable, and exclusive possession of defendant, defendant claiming title thereto adverse to plaintiff and all other persons; and during all this time the defendant was running water through said canal and exercising dominion and control
26 over the whole thereof, and running water therein for the purposes aforesaid, but that said possession was not in fact adverse to said plaintiff, nor to his grantors, except since the 19th day of May, 1866; nor did the plaintiff's immediate grantor, the State of California, ever or the plaintiff, since the 22d day of April, 1867, acquiesce in defendant's claim to the part or portion of the lands so occupied by said canal, nor in defendant's claim of right to the use of the same for the purposes aforementioned.

Ninth. That the land sued for in this action constitutes the central part of said canal, and that said canal varies in width from ten to sixteen feet, including its banks necessary to the same.

Tenth. That defendant's right to the use of the land sued for in this action for the purposes of furnishing water for mining, agricultural, domestic, and other uses and purposes, during all the time since the construction of said canal has been uniformly acknowledged and recognized by the local customs, laws, and decisions of the courts of this State and the United States, except as against the title to said land derived from the Government of the United States prior to the 26th day of July, 1866, and that the said land is necessary and indispensable for the uses of said canal, which would be almost valueless without the use of said land.

Eleventh. That there were no houses or settlements made on the line of said canal in controversy until the month of July, 1853.

27 Twelfth. That about the month of July, 1853, one settled on the southwest quarter of section sixteen, erected a dwelling-house, and cultivated a small piece of ground; that one Jenkins, in July or August of the same year, settled upon the northwest quarter of section sixteen, erected a dwelling-house, and cultivated a small piece of land as a garden; that one Hamilton, in July of the same year, settled upon section twenty-one, erected a dwelling-house, and cultivated the soil; that Hardesty, Hamilton, and Jenkins were the first settlers along the line of this canal, and that two of them used water from the canal for irrigating purposes in the year 1853.

Thirteenth. That defendant's said canal has, since its construction, furnished the town of Folsom, in Sacramento County, California, with water, both for irrigating and domestic purposes and uses, and still does so.

Fourteenth. That along the line of said canal, but not on section sixteen, are extensive and valuable gravel-deposits of gold-bearing earth, varying in depth from a few feet to fifty feet, and many large farms and vineyards entirely dependent on said canal for water, for mining and irrigating, and domestic uses and purposes; and that there is no other route than this over and through the lands in controversy by which water can be brought to supply these mines, farms, and vineyards with water for these purposes.

28 Fifteenth. That at the time said canal was located and constructed, and all the time since by the customs, rules, and regulations of the district in which said canal is located, and by all persons and parties, the rights, titles, and claims of the defendant to have, use, and enjoy the same, and to possess and hold the same as its property, have been always acknowledged and recognized, except as against the title to the land over which said canal passes, derived from the Government of the United States prior to the 26th day of July, 1866.

Sixteenth. That plaintiff, ever since he went upon the premises adjoining said canal in the year 1861 or 1862, has purchased water from defendant's canal for irrigating the lands along and adjoining said canal till within two years last past; and that until his application for a patent for the lands in controversy, in section sixteen, always recognized and acknowledged defendant's right to and ownership and possession of said canal and the lands in controversy herein.

Seventeenth. That defendant acquired by the construction and use of said canal a vested right to possess and use the same for the purposes of furnishing water for the purposes aforesaid, except as against the title to the lands over which said canal passes, derived from the Government of the United States prior to the 26th day of July, 1866, which right, except as against said title, has continued ever since.

29 Eighteenth. That at the time said section sixteen was certified

over by the officers of the United States Government to the State of California, to wit, on the 28th day of September, 1866, the plaintiff was an actual settler thereon, with dwelling-house, and agricultural and other improvements thereon, and had been since about the year 1861, when he succeeded Hardesty; that the Jenkins place, on the northwest quarter of the same section, settled on by him in July or August of 1853, was, from said last-mentioned date to the present time, occupied in like manner—first by Jenkins; then by a Dutchman, whose name did not transpire on the trial of this action; and lastly, and still, by one Stroup, (the periods of their several occupancies not being shown on said trial;) that the Hardesty place and the Jenkins place have been continuously cultivated by those living upon them since July or August of 1853, down to the present time.

Nineteenth. That notice, as required by the fifth section of the act of April 27th, 1863, entitled "An act to provide for the sale of certain lands belonging to the State," was given to defendant.

Twentieth. That the application of plaintiff to purchase said lands mentioned in his complaint from the State was made under said act after the survey of said lands by the United States Government.

30 Twenty-first. That prior to the commencement of this action no notice to quit, or to deliver up the premises in controversy, or any portion thereof, was ever made or given to defendant by plaintiff, or any other person or party, nor any demand for said premises, or the possession of the same or any part thereof, was ever made on defendant by plaintiff, or any other person or party.

Twenty-second. That said canal is a public work, but the right to use and enjoy the land sued for in this action, in section sixteen, was not acquired by defendant by grant from the United States Government or from the State of California.

Twenty-third. That the said plaintiff, on the 9th day of June, A. D. 1870, made, executed, and delivered to the Pacific Mutual Life Insurance Company of California a certain instrument in writing, purporting on its face to be a deed, selling and conveying the premises described in the complaint in this action to said company; and that the said company at the same time executed and delivered to the said plaintiff a parol agreement, in writing, by which agreement said company agreed to and with said plaintiff to reconvey the said premises back to said plaintiff at the time and on the conditions in said agreement named. That no reconveyance has ever been made of the said premises by said company

31 to said plaintiff, but that said instrument so given, purporting on its face to be a deed, was expressly given by plaintiff and received by said company as a mortgage (and not a deed) to secure the payment of a certain sum of money loaned by said Pacific Mutual Life Insurance Company of California to said plaintiff; and that said instrument was in fact a mortgage and not a deed.

Twenty-fourth. That in the year A. D. 1872, the plaintiff being indebted to one Jones and others in several amounts of money, entered into an agreement with them by which he leased and let to them his (plaintiff's) vineyard and woodland, (but not the land in controversy in this suit,) for the years 1872 and 1873, they, Jones and others, to have the crops and the use of the woodland these two years in full payment of the said several amounts owing to them from said plaintiff, whatever the sum of said several amounts might be or was, but that the land sued for in this action was not embraced in that let and leased; that the land last mentioned has never been let by plaintiff to or leased by any one.

Twenty-fifth. That said canal covers and furnishes with water and is

the only source of supply for about seventeen sections of valuable mining and agricultural lands, and that about three thousand people, settled upon these lands, are dependent upon this canal for their supply
32 of water for domestic, mining, and agricultural purposes and uses; that at the time said canal was constructed, and ever since, it has been the custom, rule, and regulation of the district in which said canal is located, and of all persons therein, to recognize the right, title, and claim of canal owners to have, own, and enjoy the right, ownership, and possession of canal property.

Twenty-sixth. That the plaintiff and his grantors have been seized of the premises sued for in this action, in section sixteen aforesaid, within two years next preceding the commencement of this action, but have exercised no control or dominion over it except by purchase and conveyance of the same.

Twenty-seventh. That defendant is, and was at the commencement of this action, in possession of all the land and premises sued for in this action.

Twenty-eighth. That the land and premises sued for are situated in the county of El Dorado, State of California, and are part of the south half of section number sixteen, and the northeast quarter of the northwest quarter of section number twenty-one, all in township number ten north of range eight east, Mount Diablo base and meridian.

Twenty-ninth. That said land and premises are correctly described in the amended complaint.

33 Thirtieth. That of the land and premises described in the amended complaint as 80.40 chains in length and ten feet in width, situated in section sixteen, seventeen chains in length and ten feet in width, is situated in the northeast quarter of the southwest quarter of section sixteen; and nine chains in length and ten feet in width, is situated in the northwest quarter of the southeast quarter of section sixteen; and 20.40 chains in length and ten feet in width, is situated in the southwest quarter of the southeast quarter of section sixteen; and thirty-four chains in length and ten feet in width, is situated in the southeast quarter of the southwest quarter of section sixteen.

Thirty-first. That the land in controversy constitutes that portion of the canal lying in the south half of section sixteen, and the northeast quarter of the northwest quarter of section twenty-one.

Thirty-second. That the south half of section sixteen, and the northeast quarter of the northwest quarter of section twenty-one, are agricultural and not mineral lands.

Thirty-third. That about the month of July, A. D. 1853, one Hardesty settled upon the southwest quarter of section sixteen; that he constructed a dwelling-house and cultivated about two acres of ground, and that prior to the year 1858 he left the premises.

34 Thirty-fourth. That prior to the 19th of May, A. D. 1866, township ten (10) north, range eight (8) east, Mount Diablo base and meridian, was surveyed and sectionized by the United States Government, and that on the 19th day of May, 1866, the said survey was approved by the United States surveyor-general for the State of California.

Thirty-fifth. That the township-plat of township number ten (10) north, range eight (8) east, Mount Diablo base and meridian, as approved by United States surveyor-general for California, was, on the 16th day of June, 1866, filed in the United States land-office at Marysville, California.

Thirty-sixth. That township number ten north, range eight east, of

Mount Diablo base and meridian, was, on the 16th day of June, and the 28th day of September, 1866, in the Marysville land-district, and is now in the Sacramento land-district.

Thirty-seventh. That on the 28th day of September, 1866, the register of the United States land-office at Marysville, certified to the State land-office that there were no claims filed on the sixteenth section of township ten north, range eight (8) east, Mount Diablo base and meridian, except the pre-emption number three thousand six hundred
35 and fifty, of John Hancock, for the west half of the northwest quarter of said section sixteen.

Thirty-eighth. That said John Hancock subsequently abandoned said pre-emption claim.

Thirty-ninth. That on the 22d day of April, 1867, the State of California, under the provisions of an act of the Congress of the United States, entitled "An act to provide for the survey of the public lands of California, the granting of pre-emption rights therein, and for other purposes," approved March third, one thousand eight hundred and fifty-three, and in accordance with the various acts of the legislature of said State preceding said 22d day of April, A. D. 1867, did, by letters-patent, grant and convey to the plaintiff the tract of land located and described as follows, to wit: The southeast quarter, and the east half of the southwest quarter, and the northwest quarter of the southwest quarter, all of section number sixteen, township number ten north, range number eight east, Mount Diablo base and meridian, together with all the privileges and appurtenances thereunto belonging and appertaining, and that said plaintiff has never since been divested of the same, or of any portion thereof.

Fortieth. That said plaintiff and his witness, in his application for the lands sued for in said section sixteen, stated in their affidavits
36 therein that said lands were unoccupied by any other person than plaintiff, and that there were no improvements other than plaintiff's on said land, and that, to their best knowledge and belief, there was no valid claim existing to said land adverse to said plaintiff.

Forty-first. That this action was commenced on the 16th day of April, A. D. 1868.

Forty-second. That the value of the monthly rents and profits of that portion of the land sued for, lying in said section sixteen, is one dollar per month.

Forty-third. That defendant has been in possession of said last-mentioned land ever since the said 22d day of April, A. D. 1867.

Forty-fourth. That on the 16th day of October, 1866, the Central Pacific Railroad Company entered into an agreement with the plaintiff, wherein the said railroad company agreed to sell to the plaintiff the following-described lands, to wit, the northeast quarter of the northwest quarter of section twenty-one, township number ten north, range eight east, Mount Diablo base and meridian, for the consideration of fifty dollars, of which said sum the plaintiff, on said 16th day of October, 1866, paid the sum of ten dollars, and one year's interest on the remainder; that by the terms of said agreement the remainder of said principal, with interest at the rate of ten per cent. per annum, was to be
37 paid before the 16th day of October, 1871; that said railroad company further agreed that, upon the punctual payment of said purchase-money and interest, then the said railroad company would, after the receipt of a patent from the Government of the United States, cause to be made and executed to the plaintiff a deed in fee-simple of said premises. And it was further agreed by said contract that if the

plaintiff should fail punctually to make any of said payments of interest or principal, then the said railroad company, its successors and assigns, should have the right to enter upon and take possession of the said premises, with all the improvements thereon.

Forty-fifth. That plaintiff took and held possession, from the date of said agreement and under said agreement, of all the lands described therein, except the strip of land described in the amended complaint as being ten feet in width and 4.15 chains in length.

Forty-sixth. That said strip of land, ten feet in width and 4.15 chains in length, was, on the 16th day of October, 1866, and ever since has been in the possession of defendant.

Forty-seventh. That plaintiff complied with all the terms and conditions of the agreement of the 16th of October, 1866, and thereafter, on the 9th day of June, 1870, the said Central Pacific Railroad Company made, executed, and delivered to plaintiff a deed of bargain and
38 sale of the land described in said contract of the 16th day of October, 1866.

Forty-eighth. That on day of July, 1853, one Hamilton settled upon section twenty-one, township number ten north, range eight east, Mount Diablo base and meridian; that he constructed a dwelling-house and cultivated a few acres of land; that prior to the year 1858 he left said section twenty-one.

Forty-ninth. That on the 27th day of June, 1867, the Government of the United States of America issued to the Central Pacific Railroad Company of California a patent for the odd sections in township number ten north, range eight east, Mount Diablo base and meridian.

And as conclusions of law upon the foregoing facts the court finds as follows, to wit:

First. That the title of the United States to the land sued for in section sixteen, township number ten north, range eight (8) east, Mount Diablo base and meridian, passed to the State of California, as to designation and quantity, by the act of the Congress of the United States, approved March 3d, 1853, entitled "An act to provide for the survey of the public lands of California."

Second. That upon said lands being surveyed and sectionized by the United States Government, and said survey being approved by
39 the United States surveyor-general for the State of California, on the 19th day of May, 1866, the title to said lands vested in the State of California absolutely, not only as to designation and quantity, but as to place and position also.

Third. That Congress had no power, after the 19th day of May, 1866, to impair or limit the title of the State of California, or of its grantee, the plaintiff in this suit, to the land sued for in this action in said section sixteen.

Fourth. That defendant could not hold adversely to the United States while the title to said lands in section sixteen was still in the General Government; nor could it hold adversely to the State of California until said lands were surveyed and sectionized by the Government of the United States, and the title to said lands had vested absolutely in the State of California as to place and position.

Fifth. That defendant could not hold adversely to the plaintiff in this action until he had obtained his patent to the land from the State of California.

Sixth. That at the date of the passage of the act of Congress of July 26th, 1866, the General Government had no title to the lands sued for

in said section sixteen, consequently could confer no rights nor privileges upon the defendant with reference to said lands.

Seventh. That plaintiff's patent for the land sued for in said
40 section sixteen, is presumptive proof of all facts necessary to authorize its issuance, and every legal intendment necessary to its validity is to be presumed in its favor.

Eighth. That as defendant has not connected itself with the true title to said land, which from the 19th day of May, 1866, until the issuance of the patent to plaintiff, on the 22d day of April, 1867, was in the State of California, defendant cannot dispute nor attack the patent from the State in any manner nor for any purpose.

Ninth. That the plaintiff is the owner of and entitled to the possession of the land sued for in said section sixteen, and was so at the commencement of this action, and has been ever since the 22d day of April, A. D. 1867.

Tenth. That the plaintiff is entitled to recover in this action the possession of the land sued for in said section sixteen, and the sum of fifty-nine dollars for the monthly rents and profits of said land from the said 16th day of April, 1868, down to the present time, and his costs of suit herein.

Eleventh. That the plaintiff was not the owner of nor entitled to the possession of the land sued for in section twenty-one, of said township ten, at the commencement of this action; nor is he entitled to recover the possession of the same in this action, nor any sum whatever as rents or profits therefor.

41 Twelfth. That the plaintiff had no such interest in the lands sued for in section twenty-one, at the commencement of this suit, as will enable him to maintain this action in relation thereto.

It is therefore ordered that the plaintiff herein do have judgment against said defendant conformable to the foregoing findings of fact and conclusions of law.

Dated April 4th, 1873.

A. C. ADAMS,
District Judge Eleventh Judicial District, California.

Filed April 8th, 1873.

R. O. TURNBULL, *Clerk.*

Whereupon the court renders the following judgment:

Judgment.

(Title of court and cause.)

This cause coming on regularly for trial on the 24th day of February, 1873, at the regular February term of said court for said year, before the court, without a jury, (a jury being expressly waived by the respective parties in open court,) the plaintiff appearing by his attorneys,
42 George E. Williams and G. J. Carpenter, esq's, and the defendant by its attorneys, C. G. W. French and George G. Blanchard, esq., the parties produced their several witnesses and other proofs, and, after argument by respective counsel, the cause was finally, on the 26th day of February, 1873, submitted to the court for its findings, decision, and judgment, with a stipulation made in open court by the respective parties, through their said attorneys, duly entered in the minutes of said cause, that the court might make and file said findings, decision, and

judgment at any time before or on the 10th day of April, 1873, and the said cause was by the court taken under advisement.

And now at this time, the court being fully advised in the premises, and having made its said findings of fact and conclusions of law, which are filed herewith, it is ordered and adjudged by the court that the plaintiff, B. N. Bugbey, do have and recover of and from the defendant, Natoma Water and Mining Company, the possession of all that certain tract of land situated in the county of El Dorado, in the State of California, ten feet in width, and about 80.40 chains in length, which includes the bed and banks of that certain canal called Natoma Water and Mining Company's Canal, commencing at the point where the dividing-line between the northwest quarter and the southwest quarter
43 of section sixteen, in township number ten north, or range number eight east, Mount Diablo base and meridian, crosses the said Natoma Water and Mining Company's Canal, about 8.30 chains west of the center of said section sixteen; and running thence southerly, following the meanderings of said canal, and always maintaining the same breadth of ten feet, the center of said tract being the center of said canal, through the south half of said section sixteen, a distance of about 80.40 chains, to the point where the dividing-line between said section sixteen and section twenty-one of said township number ten crosses said canal.

And it is further ordered and adjudged by the court that said plaintiff do have and recover of and from said defendant, for the rents and profits of said premises, the sum of fifty-nine dollars, together with the sum of one hundred and eight dollars and fifty cents, his costs of suit herein.

Dated April 4th, 1873.

A. C. ADAMS,
District Judge Eleventh Judicial District, California.

Filed April 8th, 1873.

R. O. TURNBULL, *Clerk.*

And it is further ordered and adjudged that the prayer of plaintiffs for judgment for the recovery of the possession of that portion of the canal described in the complaint and findings as being in section 21, township 10, range 8 east, Mount Diablo base and meridian, and 4.15 chains in length, be denied, and that the cause of action set forth in the complaint for said 4.15 chains of the canal be dismissed.

44 *Amended judgment.*

(Title of court and cause.)

This cause having been heretofore tried, and on the 26th day of February, A. D. 1873, (during the regular February term of said court,) argued and submitted to the court for its findings, decision, now on this 8th day of April, A. D. 1873, the court being fully advised in the premises, delivers its findings and decision, which are filed of this date with the clerk of this court in writing; wherefore, by reason of the law and the findings and decision aforesaid, it is ordered by the court that judgment be entered herein against said defendant and in favor of said plaintiff for the possession of all that certain tract of land situated in the county of El Dorado, in the State of California, ten feet in width and about 80.40 chains in length, which includes the bed and banks of that certain canal called "The Natoma Water and Mining Company's Canal," commencing at the point

where the dividing-line between the northwest quarter and the southwest quarter of section sixteen, in township number ten north, of range number eleven east, Mount Diablo base and meridian, crosses the said Natoma Water and Mining Company's Canal about 8.30 chains west of the center of said section sixteen, and running thence southerly, following the meanderings of said canal, and always maintaining the same breadth of ten feet, the center of said tract being the center of said canal, through the south half of said section sixteen, a distance of about 8.40 chains, to the point where the dividing-line between said section sixteen and section twenty-one of said township number two crosses said canal; and it is further ordered by the court that said plaintiff have judgment entered herein against said defendant for the rents and profits of said premises, amounting to the sum of fifty-nine dollars, and for costs of suit.

Ordered entered, according to stipulation on file herein, this 8th day of April, A. D. 1873.

R. O. TURNBULL, *Clerk.*

Exception to findings.

1. Defendant excepts to all of the eighth finding after the word "but," on the ground that the same is contrary to the evidence, in this: the evidence shows that the defendant's possession to said land was adverse to plaintiff's and his grantor; also that plaintiff and his grantor did acquiesce in defendant's claim and possession.

2. Defendant excepts to that portion of tenth finding between the words "except United States" and the word "and," next after the figures 1866, on the ground that the same is contrary to evidence, which shows that defendant held adverse to all persons and parties.

3. Defendant excepts to the words "but not on section sixteen," in finding fourteen, because the same is contrary to the evidence, in this: the evidence shows valuable and rich mining claims on said section.

4. Defendant excepts to all of the fifteenth finding, including and after the words "except as against," because the same is contrary to the evidence in this: the evidence shows that defendant held as to title also against the United States and every one else.

5. Defendant excepts to so much of seventeenth finding as is embraced, including and after "except as against the title," upon the same grounds as last above.

6. Defendant excepts to the whole of the nineteenth finding on the grounds that there is no evidence to suport it, but the evidence shows that the notice was not given; also it was admitted by plaintiff at the trial that notice was not given.

7. Defendant excepts to the whole of the twentieth finding because it is contrary to the evidence, in this: the evidence shows that plaintiff's application to purchase was made before the survey of said lands.

8. Defendant excepts to all of twenty-second finding, including and after the word "but," because the same is contrary to the evidence, in this: that the testimony that the right to the canal was acquired by defendant by grant from the United States and this State.

9. Defendant excepts to so much of twenty-third finding, after the word "but," as finds that the deed therein mentioned was a mortgage, because the same is a conclusion of law and is contrary to the evidence in this: the evidence shows the same to be an absolute deed.

10. Defendant excepts to the whole of twenty-sixth finding, except to

the last three lines, because the same is against the evidence in this: the evidence shows that neither plaintiff nor his grantor have been seized of the premises or any part thereof, within two years or within ten years before the commencement of this action.

11. Defendant excepts to the thirty-second finding, because the same is contrary to the evidence in this: the evidence shows that said lands are mineral lands.

12. Defendant excepts to so much of the thirty-ninth finding as finds that said conveyance was in accordance with said acts, because the same is contrary to the evidence in this: the evidence shows that said conveyance was not in accordance with any of said acts.

13. Defendant excepts to all of the conclusions of law relating to the sixteenth section.

48 Defendant excepts to the conclusions of law and the decision of the court as to lands sued for on section sixteen, and to the decision and judgment thereon:

First. Because said conclusions of law are not sustained by the findings of fact, but are against said findings, and in conflict with said findings of fact.

Second. Because on the whole findings of fact, the conclusions of law and the decision of the court in this case should have been in favor of the defendant and against the plaintiff.

Third. Because on the whole case, including the evidence and findings, the decision should have been for defendant.

Fourth. Because on the findings of fact alone, the decision and judgment in this case should have been for defendant.

Fifth. Because the findings of fact support and warrant a decision and judgment for defendant, and because such findings do not support nor warrant a decision or judgment for plaintiff.

Filed May 17th, 1873.

R. O. TURNBULL, *Clerk.*

Bill of exceptions.

(Title of court and cause.)

49 Now on this 24th day of February, A. D. 1873, this cause came on for trial before the court sitting without a jury, when defendant moves the court for a continuance of the same, upon the affidavits of H. G. Livermore, George G. Blanchard, C. W. G. French, and H. T. Knight, filed at the November term, 1872, and upon which a continuance was granted.

Affidavit of H. G. Livermore.

(Title of court and cause.)

H. G. Livermore, being duly sworn, deposes and says:

That he is the president of the above-named company, defendant, and so has been for years, and long before the time of the commencement of the above-entitled action; that said action was commenced in the month of April, in the year 1868; that affiant was informed by C. G. W. French, attorney in said cause for defendant, some time in the latter part of the year 1870, that an arrangement or agreement had been made by which the said action would be continued from term to term indefinitely, until fifteen days' notice before the term of court should be given; that said notice has not been given; that the issues of law in

where the dividing-line between the northwest quarter and the southwest quarter of section sixteen, in township number ten north, of range number eleven east, Mount Diablo base and meridian, crosses the said Natoma Water and Mining Company's Canal about 8.30 chains west of the center of said section sixteen, and running thence southerly,
45 following the meanderings of said canal, and always maintaining the same breadth of ten feet, the center of said tract being the center of said canal, through the south half of said section sixteen, a distance of about 8.40 chains, to the point where the dividing-line between said section sixteen and section twenty-one of said township number two crosses said canal; and it is further ordered by the court that said plaintiff have judgment entered herein against said defendant for the rents and profits of said premises, amounting to the sum of fifty-nine dollars, and for costs of suit.

Ordered entered, according to stipulation on file herein, this 8th day of April, A. D. 1873.

R. O. TURNBULL, *Clerk.*

Exception to findings.

1. Defendant excepts to all of the eighth finding after the word "but," on the ground that the same is contrary to the evidence, in this: the evidence shows that the defendant's possession to said land was adverse to plaintiff's and his grantor; also that plaintiff and his grantor did acquiesce in defendant's claim and possession.

2. Defendant excepts to that portion of tenth finding between the words "except United States" and the word "and," next after
46 the figures 1866, on the ground that the same is contrary to evidence, which shows that defendant held adverse to all persons and parties.

3. Defendant excepts to the words "but not on section sixteen," in finding fourteen, because the same is contrary to the evidence, in this: the evidence shows valuable and rich mining claims on said section.

4. Defendant excepts to all of the fifteenth finding, including and after the words "except as against," because the same is contrary to the evidence in this: the evidence shows that defendant held as to title also against the United States and every one else.

5. Defendant excepts to so much of seventeenth finding as is embraced, including and after "except as against the title," upon the same grounds as last above.

6. Defendant excepts to the whole of the nineteenth finding on the grounds that there is no evidence to suport it, but the evidence shows that the notice was not given; also it was admitted by plaintiff at the trial that notice was not given.

7. Defendant excepts to the whole of the twentieth finding because it is contrary to the evidence, in this: the evidence shows that plaintiff's application to purchase was made before the survey of said lands.

8. Defendant excepts to all of twenty-second finding, including and after the word "but," because the same is contrary to the evidence, in this: that the testimony that the right to the canal was acquired by defendant by grant from the United States and this State.

9. Defendant excepts to so much of twenty-third finding, after the word "but," as finds that the deed therein mentioned was a mortgage, because the same is a conclusion of law and is contrary to the evidence in this: the evidence shows the same to be an absolute deed.

10. Defendant excepts to the whole of twenty-sixth finding, except to

the last three lines, because the same is against the evidence in this: the evidence shows that neither plaintiff nor his grantor have been seized of the premises or any part thereof, within two years or within ten years before the commencement of this action.

11. Defendant excepts to the thirty-second finding, because the same is contrary to the evidence in this: the evidence shows that said lands are mineral lands.

12. Defendant excepts to so much of the thirty-ninth finding as finds that said conveyance was in accordance with said acts, because the same is contrary to the evidence in this: the evidence shows that said conveyance was not in accordance with any of said acts.

13. Defendant excepts to all of the conclusions of law relating to the sixteenth section.

48 Defendant excepts to the conclusions of law and the decision of the court as to lands sued for on section sixteen, and to the decision and judgment thereon:

First. Because said conclusions of law are not sustained by the findings of fact, but are against said findings, and in conflict with said findings of fact.

Second. Because on the whole findings of fact, the conclusions of law and the decision of the court in this case should have been in favor of the defendant and against the plaintiff.

Third. Because on the whole case, including the evidence and findings, the decision should have been for defendant.

Fourth. Because on the findings of fact alone, the decision and judgment in this case should have been for defendant.

Fifth. Because the findings of fact support and warrant a decision and judgment for defendant, and because such findings do not support nor warrant a decision or judgment for plaintiff.

Filed May 17th, 1873.

R. O. TURNBULL, *Clerk.*

Bill of exceptions.

(Title of court and cause.)

49 Now on this 24th day of February, A. D. 1873, this cause came on for trial before the court sitting without a jury, when defendant moves the court for a continuance of the same, upon the affidavits of H. G. Livermore, George G. Blanchard, C. W. G. French, and H. T. Knight, filed at the November term, 1872, and upon which a continuance was granted.

Affidavit of H. G. Livermore.

(Title of court and cause.)

H. G. Livermore, being duly sworn, deposes and says:

That he is the president of the above-named company, defendant, and so has been for years, and long before the time of the commencement of the above-entitled action; that said action was commenced in the month of April, in the year 1868; that affiant was informed by C. G. W. French, attorney in said cause for defendant, some time in the latter part of the year 1870, that an arrangement or agreement had been made by which the said action would be continued from term to term indefinitely, until fifteen days' notice before the term of court should be given; that said notice has not been given; that the issues of law in

50 this cause were not disposed of and passed upon by the court till the 19th day of November, 1872; that said defendant cannot proceed to the trial of this said cause at this, the November term, 1872, of said court, on account of the absence of the following-named witnesses, who are each material and necessary witnesses on the part of defendant in said action, to wit: A. T. Arrowsmith, Lucius B. Brooks, L. B. Ayer, and Robert Gardiner; that defendant cannot safely proceed to the trial of said action without the evidence of said witnesses, and that defendant will be able to procure their personal attendance as witnesses, or their depositions, at the next term of this hon. court; that said witness A. T. Arrowsmith has resided for some time at Yonkers, in the State of New York, but, in the pursuit of his profession, been engaged on railroad lines in the Western States; that affiant is informed and believes that he will ascertain the certain whereabouts of said witness within one week from this date, and that his deposition can certainly be obtained before the next term of this hon. court; that defendant expects to prove by said witness A. T. Arrowsmith that said Arrowsmith has been well acquainted with the land in controversy since the year 1850; that he is a civil engineer by occupation; that he was the engineer who made the original survey and location of the line of defendant's canal over the land sought to be recovered in this action, and was superintendent
51 of said canal and works, from the time of the construction of the same, in 1852, up to 1866; that he is also well acquainted with plaintiff Bugbey; that the lands sought to be recovered in this action are mineral lands, and also the lands adjacent to the same, and through which said canal passes, and were only occupied for mining purposes when said canal was first constructed, and for a long time thereafter; that said canal was constructed in the year 1851–'2, and has been continuously used, held, operated, owned, and managed by defendant, ever since claiming the same, against all persons and parties, even against the United States, and during all that time continuously used for supplying water to miners for mining, and to others for agricultural and domestic and other purposes; that on the 17th day of October, 1866, and for many years prior thereto, and ever since, there were and have been agricultural occupants to that portion of section sixteen in which the lands in controversy are located; that the same were cultivated, settlements made, and dwelling-houses erected thereon, and pre-emption rights claimed therein; and this plaintiff, Bugbey, from the time he came and occupied the said adjacent lands, always admitted and fully acknowledged defendant's ownership of said canal and defendant's perpetual right to the possession of the land sought to be recovered by this action;
52 that said witness, Lucius B. Brooks, now resides at Hamilton, in the State of Nevada; that defendant expects to prove by said Brooks that he was the original contractor for the construction of said canal; that it was constructed on the lands in controversy by said Brooks, in the year 1852; that said Brooks was originally one of the largest owners, and so until a few years since, if not still; that the lands sought to be recovered in this action constitute the bed of said canal and its banks; that said canal was located in the year 1851, and excavated and constructed in the year 1852, for mining purposes chiefly, but also for agricultural and domestic purposes, and for furnishing water for the same, and that it has been continuously, without interruption, used by defendant for those purposes during all the time since its construction; that the lands in controversy, at the time of defendant's entry there, and the construction of said canal therein, were vacant, open, unsurveyed lands of the United States—mineral lands, containing mines of gold;

that defendant has had the peaceable, absolute, exclusive, uninterrupted, actual, and adverse possession of the land sought to be recovered in this action ever since the year 1851, and that plaintiff never owned or had any interest in the same; that defendant expects to prove by said witness, L. B. Ayer, that he (the said Ayer) was register of the
53 United States land-office, in the land district wherein said lands are located, at the time the map plats of township number ten north, range eight east, was filed in said office, which was the Marysville land-office, California, on the 16th day of June, A. D. 1866; that so much of the lands described in plaintiff's complaint as are a part of section sixteen, in said township ten north, eight east, were certified over by the said Ayer, on the part of the United States, to the State of California, on the 28th day of September, in the year 1866, and never before this time.

That no right, title, or interest in any of the lands in said section sixteen ever passed to the State of California from the United States till long after 26th day of July, A. D. 1866; that said Ayer resides at the city of Marysville, in the State of California; that said witness, Robert Gardiner, resides at the city of Sacramento, in California, and is the surveyor-general of said State; that defendant expects to prove by said witness Gardiner that he is ex-officio register of the State land-office, and has therein the records of the acts of the officers of the United States land officers, concerning lands claimed by the State, including the sixteenth and thirty-sixth sections of the United States township; that the township plat of township number ten north,
54 range eight east, was filed in the Marysville land-office on the 16th day of June, 1866; that no lands ever were certified over to the State by the United States till after three months from the term the said township plat has been filed as aforesaid, and that the lands in plaintiff's complaint described as a portion of said section sixteen of said township were not certified over to the State of California till the 28th day of September, A. D. 1866. And affiant further saith that, although by reason of the long time this action has been pending without being prosecuted, and from other causes, he had, and defendant had, good and reasonable grounds for doubting that this action would ever be urged to issue of facts, and that defendant did not in fact apprehend such issue in a cause stale in its age; yet defendant, before the issue or demurrer had been submitted or disposed of by this honorable court, and for months before, did, with all diligence, seek to find out the whereabouts of the said Lucius B. Brooks, and also the whereabouts of the said A. T. Arrowsmith; that defendant never learned nor ascertained the place of residence of the said Brooks until last Saturday, the 23d instant of this November; that during the month of October said defendant's attorney, C. G. W. French, in search of said witnesses, visited and traveled over various portions of the counties of Placer, Nevada, Alameda, Solano, and Napa, and wrote letters to all such persons as were
55 judged most likely to know the whereabouts of said witnesses; that on said 23d day of November instant he first learned, through parties living in said county of Napa, the whereabouts of the said Brooks, and that the present whereabouts of the said witness Arrowsmith affiant has every reason to believe, and does believe, will be ascertained within a very few days; that defendant also made timely application to said witness Ayer, but was informed by him that the surveyor-general of the State of California only had the records of the time of said certifying over of the lands as aforementioned, and, on application at said office, defendant learned that said surveyor-general and

ex-officio register of the State land-office was out of the State of California; that said witness Gardiner did not return to this State till the 5th day of this present November, 1872; that the time of receiving the notice under the stipulation expired on the 3d day of said November; that the superintendents and agents of said defendant have also sought the testimony of said witnesses, as well as its attorney, and by similar acts. And affiant further saith that he knows of no other witnesses by whom he can prove the same facts, and that the evidence that he expects to procure from these witnesses is not cumulative; that defendant relied upon the stipulation aforementioned for a continuance after
56 the 3d day of November until this honorable court required further showing for a continuance of said cause; that defendant will be able to procure evidence of said witnesses either by their attendance or their depositions at the next term of this honorable court; that this application is not made for delay, but from the necessity of procuring said testimony, and that justice may be done.

H. G. LIVERMORE.

Subscribed and sworn to before me this 27th day of November, 1872.

JOHN HANNELL, *Notary Public.*

Filed November 29th, 1872.

R. O. TURNBULL, *Clerk.*

Stipulation.

(Title of court and cause.)

It is hereby stipulated that this case be continued from term to term, until fifteen days' notice of trial by either party, before the term of court set for trial.

ROBERT ROBINSON,
Attorney for Plaintiff.
C. G. W. FRENCH,
Attorney for Defendant.

Filed November 14th, 1872.

R. O. TURNBULL, *Clerk.*

57 *Affidavit of George G. Blanchard.*

(Title of court and cause.)

George G. Blanchard, being duly sworn, says:

That he is an attorney at law, and has resided in the city of Placerville for the past three years; that he has during all of that time been acquainted with C. G. W. French, esq., and the above-named plaintiff and defendant.

That said French is now and has been the attorney of record in said cause for said defendant during all of said time; that affiant has been, since about February 11th, 1871, counsel for defendant in the said cause; that one Robert Robinson was the attorney of record in said cause for plaintiff from its commencement until the May term of said court, 1872.

That on or about the 11th day of February, 1871, said attorney for defendant, C. G. W. French, sent to affiant the stipulation entered into by and between himself, for and on behalf of said defendant, and said Robert Robinson, for and on behalf of said plaintiff, which said stipulation was in the possession of affiant from said 11th day of February,

1871, as counsel for defendant, until the 14th day of November, 1872, when he delivered the same for filing to the clerk of said court, and which by him filed November 14th, 1872. Said stipulation is hereto referred and made a part of this affidavit.

58 That said stipulation was sent to affiant by said French, and received by affiant on the 11th day of February, 1871, and been retained by him ever since for the sole purpose of conducting the proceedings of said cause in compliance therewith.

That said French, within fifteen days before the commencement of each term of said court held in said county, has written to affiant in relation to said cause, and to ascertain if the notice in said stipulation specified has been given.

That said defendant has implicitly relied upon said stipulation, and governed itself in relation to said cause with reference to the same.

That said French has, previous to every term of said court held in said county since February 11th, 1871, informed affiant that no notice had been given him as provided in said stipulation.

GEORGE G. BLANCHARD.

Sworn to and subscribed before me this 18th day of November, 1872.

R. O. TURNBULL, *Clerk.*

Filed November 18th, 1872.

R. O. TURNBULL, *Clerk.*

59 *Affidavit of C. G. W. French.*

(Title of court and cause.)

C. G. W. French, being duly sworn, says that he is the attorney of record of the defendant in the above-entitled cause, and has been such attorney of record all the time since defendant appeared in said action; that R. Robinson, attorney at law, (residing in Sacramento for many years, and now resident at Sacramento or San Francisco,) was attorney of record of plaintiff in said action from the time of the commencement of said action up to the May term of this honorable court in the present year 1872; that said action was commenced on the 16th day of April, 1868; that on or about the 4th day of November, 1870, an agreement was made and entered into by and between the parties plaintiff and defendant in said action, by their said attorneys of record, to wit, by said R. Robinson, on the part of plaintiff, and affiant, C. G. W. French, on the part of defendant, in regard to the proceedings in said action in said honorable court, and to bind and control the said parties therein; that the substance of said agreement was reduced to writing then on said day of said November, A. D. 1870; that the memoranda and evidence of said agreement is on file in this case, and therefore cannot be attached to this affidavit, but is hereby referred to and made a part of the same; that said memorandum is substantially as follows:

60

"It is hereby stipulated that this case be continued from term to term until fifteen days' notice of trial by either party before the term of court set for trial.

"ROBERT ROBINSON,
"*Attorney for Plaintiff.*
"C. G. W. FRENCH,
"*Attorney for Defendant.*"

That both said Robinson and French are attorneys of all the State courts of California; and that affiant further saith that said stipulation was made a short time before the commencement of the November term of this honorable court for the year 1870, and that said action was controlled by said stipulation for that term, and has been relied upon by defendant ever since, and affiant believes that plaintiff has relied upon the same. Affiant further saith that by the provisions of said stipulation plaintiff has been enabled to keep his action in court; that said action at and before the making of said stipulation was liable to be dismissed under the rules of this honorable court; that defendant hath, ever since the making of said stipulation, observed and implicitly acted upon the same; that soon after the 3rd day of
61 this present November, 1872, affiant notified defendant and counsel that the notice had not been given to him, and that he has so constantly, ever since said stipulation had been made, so notified and acted on the same. And affiant further saith that on the evening of the 14th day of this present November he received by mail the annexed notice, and not before that time. And affiant further saith that after the 3rd day of this said November, and up to the time of receiving said notice, he had been relying entirely and implicitly on said stipulation, and defendant had in the same manner relied upon the same. And affiant further saith that all of time provided for in said notice is absolutely and indispensably necessary to defendant to prepare for trial; and that if said action be set for trial at this term it will work as a surprise on defendant.

C. G. W. FRENCH.

Subscribed and sworn to before me this 18th day of November, A. D. 1872.

R. O. TURNBULL, *Clerk*,
By E. W. WHITNER,
Deputy Clerk.

Filed November 18th, 1872.

R. O. TURNBULL, *Clerk.*

62 *Affidavit of H. T. Knight.*

(Title of court and cause.)

H. T. KNIGHT, being duly sworn, deposes and says:

That G. W. Colby was the State locating agent for the Marysville land district at the time of the application of B. N. Bugbey, plaintiff herein, for the lands in plaintiff's complaint described as portions of number sixteen, township ten north, range eight east; that said Colby is a material witness for defendant in this action; that said witness resides in the county of Butte, in this State, at a place called Nord; that defendant expects to prove by said witness that he was such locating agent as aforesaid at the time aforesaid; that said Colby never gave to defendant the notice required by the fifth section of the act entitled "An act to provide for the sale of certain lands belonging to the State," approved April 27th, 1863; that said Bugbey's said application was made and entertained under said act; that said locating agent never made the affidavit mentioned & required in said act (mentioned in said act and received) in the case of said Bugbey application, but that said Bugbey made affidavit then and there in said application that so much of said lands as are portions of said section sixteen, in words

following, viz: "That the same are unoccupied by any person other
63 than myself * * * and that there is no improvement of any description on said land other than my own."

That Bugbey's witnesses on said application made affidavit in regard to that land; that there is no valid claim existing upon the land so described, adverse to the claim above received, to wit, Bugbey's, nor any improvements other than those owned by the said applicant; that said proceedings by said plaintiff, Bugbey, in said application, were all conducted covertly and in fraud of defendant's then vested rights in the premises sued for in this action; that neither the State of California nor plaintiff ever acquired any right to the possession of the lands sued for in this action, by means of said proceedings or the patents or certificates from said State; that all defendant's right to the possession, and all of the lands sued for in this action, had then vested and accrued, and that the State of California and her said agent, Colby, then admitted and recognized said rights of defendant in said land. And affiant further saith that said defendant never learned the residence of said witness, Colby, until the 27th day of this present November, 1872; that he knows of no other witness by whom defendant can prove the same facts, and this defendant cannot safely proceed to the trial of said action at this term for the want of the evidence of the said Colby; that defend-
64 ant will be able to procure the attendance or deposition of said witness by the next term of this hon. court; that the evidence of said witness is not cumulative, but the contrary; that this application is not made for delay but in furtherance of justice; that both defendant and affiant relied upon the stipulation in the case, up to the time that this hon. court required further showing for a continuance, and since said time there has not been time to find said witness and procure his testimony. And affiant further saith that since the setting of said action for trial he has used every effort to find other witnesses to prove said facts in this affidavit set forth and has been unable to do so.

H. T. KNIGHT.

Subscribed and sworn to before me this 27th day of November, A. D. 1872.

[SEAL.] SAM'L POORMAN,
Notary Public in and for the County of Sacramento.

Filed November 29th, 1872.

R. O. TURNBULL, *Clerk.*

Affidavit of H. T. Knight.

(Title of court and cause.)

HENRY T. KNIGHT, being first duly sworn, says and deposes

65 That he is the superintendent of the Natoma Water and Mining Company, the corporation defendant in the above-entitled action: that he has been such superintendent since on or about the month of October, in the year 1866; that the original process in the above action was served on him; that as such officer of said company he has acted for and on behalf of defendant in this action, and representing the party defendant therein. And affiant further says that he has fairly

and fully stated the case in this action to C. G. W. French, his counsel therein, who resides at the city of Sacramento, in this State, and after such statement he is advised by his said counsel, and verily believes, that said defendant has a good and substantial defense on the merits to this action. And affiant further saith that, after this cause had been pending in this court more than one year, this affiant was informed by said attorney, C. G. W. French, that said plaintiff and defendant in said action had, by their respective attorneys, entered into an agreement that said cause should be continued from term to term until fifteen days' notice should be given by either party before the term fixed upon for trial; that said agreement was in substance reduced to writing by R. Robinson, attorney for plaintiff of record in this case at that time, and signed by the said Robinson on the part and behalf of said plaintiff, and by said French on the part and behalf of said defendant;
66 that at the time said stipulation was made, B. N. Bugbey, the plaintiff in this action, was in the Atlantic States. And affiant further saith that ever since the time of the making said stipulation in said case, which affiant is informed and believes was on or about the 4th day of November, A. D. 1870, this defendant has implicitly acted and relied upon the provisions of said stipulation; that plaintiff has, during all the time since said stipulation was made, received the advantages resulting from the same, and been thereby enabled to keep his cause from being dismissed, and judgment for costs entered against said plaintiff in said cause. And affiant further saith that at this November term of 1872 defendant relied with entire confidence on said agreement and the provisions thereof; that the time for giving notice under said agreement expired on the third day of November, instant, and he was informed by said counsel that the notice therein required had not been given this month, as he had always been informed hitherto at the approach of every term of said court held since said agreement was entered into. And affiant further saith that the notice provided for in said agreement is absolutely and entirely indispensable to defendant in order to enable defendant to prepare for the trial of this case; that to prove the facts set forth in defendant's answer many different
67 witnesses are necessary, and that said witnesses reside in divers places, many of them are beyond the subpœnaing distance, and one at least beyond the limits of this State; that Francis Clark, B. C. Quigley, and Charles H. Silverhorn are material witnesses for defendant in this cause, all beyond legal subpœnaing distances, but are willing to attend the trial of said cause if reasonable notice can be given them; that said Clark, on and before the 3rd day of this November instant, 1872, was residing near Yontsville, in the county of Napa; that said Quigley was at the same time residing in the county of Solano; that said Silverhorn, since the said 3rd day of November, 1872, left Folsom, in this county, for some place in the county of Mendocino, and that the present whereabouts of A. T. Arrowsmith is not known surely to this affiant, but his last known residence was either at Yonkers or New York City; that said Arrowsmith is a material witness, if his testimony can be obtained, and affiant believes it can be obtained if a continuance of this cause be had; that defendant cannot prove the facts material to its defense by other witnesses within his (affiant's) knowledge, and especially the most material facts; that he knows of no other person by whom he can prove these said facts; that the evidence of said witnesses is not cumulative; that this application is not made for
68 delay, but that justice be done. And affiant further saith that if said cause be set for trial at this term defendant will be unable

to produce at the trial his said witnesses, and that defendant will be taken at a surprise.

H. T. KNIGHT.

Sworn to and subscribed before me this 15th day of November, A. D. 1872.

JAMES S. MEREDITH,
Notary Public.

Filed November 18th, 1872.

R. O. TURNBULL, *Clerk.*

And upon the statement of C. G. W. French, counsel for defendant, showing that on the 23d day of January, 1873, a commission to take the deposition of A. T. Arrowsmith, a material and necessary witness for said defendant, residing at Yonkers, New York; also a commission to take the deposition of Lucius B. Brooks, a material and necessary witness for said defendant, residing at Hamilton, Nevada, were duly sent on said 23d day of January, 1873, through the United States mail, postage prepaid, and that neither of such depositions had been returned.

Here counsel for plaintiff admitted that the said commissions were
69 sent on the 23d day of January, 1873. Motion for the continuance was objected to on part of plaintiff, which motion was denied by the court, to which ruling defendant duly excepted, and now assigns the same as error in law occurring at the trial. Whereupon the trial proceeded and the following evidence introduced on the part of plaintiff, to wit:

Patent from State of California to Benjamin N. Bugbey.

United States of America, State of California, to all to whom these presents shall come, greeting:

Whereas, under the provisions of an act of the Congress of the United States, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third, one thousand eight hundred and fifty-three, the sixteenth and thirty-sixth sections of each township were granted to the State; and whereas the legislature of the State of California passed an act amendatory of and supplemental to the act approved April 23d, 1859, which act was approved April 22d, 1861; also an act entitled "An act to provide for the sale of certain lands belonging to the State," which act was approved on the twenty-seventh day of April, one thousand eight hundred and sixty-three; and whereas it ap-
70 pears by the certificate of the register of the State land-office, No. 70, issued in accordance with the provisions of said last-named act, bearing date the 22d day of April, 1867, that the tracts of land hereinafter described have been duly and properly located in accordance with the provisions of the said laws of this State, and that Benjamin N. Bugbey is "entitled to receive a patent therefor:" Now, therefore, the State of California hereby grants to the said Benjamin N. Bugbey, and to his heirs and assigns forever, the said tracts of land, located as aforesaid, and which are described as follows, to wit: The southeast quarter ($\frac{1}{4}$), the east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) and the northwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section number sixteen, township number ten (10) north, range number eight east, base and meridian of Mount Diablo, containing two hundred and eighty acres, together with all the privileges and appurtenances thereunto appertaining and belonging; to have and to hold the aforesaid-granted premises to the

said Benjamin N. Bugbey, and to his heirs and assigns, to his and their use and behoof, forever.

In testimony whereof I, Frederick F. Low, governor of the State of California, have caused these letters to be made patent, and the seal of the State of California to be hereunto affixed.

Given under my hand, at the city of Sacramento, this the twenty-
71 second day of April, in the year of our Lord one thousand eight hundred and sixty-seven.

FRED'K F. LOW,
Governor of State.

Attest:
BENJAMIN B. REDDING,
Secretary of State.

Countersigned:
J. F. HOUGHTON,
Register of the Land-Office,
By A. S. BENDER.

Filed August 14th, 1868.
Recorded August 15th, 1868, in book L of deeds, 556.

(Title of court and cause.)

I, W. N. Maffley, hereby certify the foregoing to be a true copy of the original as appears of record in my office.

Witness my hand and official seal this the 8th day of June, A. D. 1870.

[SEAL.]

W. N. MAFFLEY,
County Recorder.

Defendant objected to the introduction of patent, on the grounds—

First. That it is incompetent, irrelevant, and immaterial.

Second. Because there has been no title shown in the State of California to this section sixteen at any time; that the section did not pass to the State by the act of 1853.

72 Third. Because the plaintiff has not done or performed the prerequisite steps and conditions required by the laws of this State, upon which such patent could only be issued.

Because said patent was obtained without performing the preceding acts required by the laws of this State.

That it is not shown that the affidavit required by law was made or filed by the locating agent for the land district in which the land is situated.

That it is not shown that notice to occupant, as required by law, was given.

That it is not shown that notice was ever published, as required by section five of the act of 1863 of this State, that a patent was about to be issued.

Fifth. That the State was estopped from setting up title to this land, having by her courts and laws recognized and acknowledged the right of the defendant to the land in question prior to the execution of the patent; that the State is estopped from conveying the premises or denying the defendant's vested rights therein.

Sixth. Because the title to the premises in question has been first in the United States, and has been in the defendant ever since the defendant entered the location as the line of its ditch thereon.

Seventh. Because it conflicts with the defendant's vested rights in the premises sued for.

73 Eighth. That the defendant has had actual, peaceable, and adverse possession of the premises in question, as against the State of California and the United States, for more than ten years prior to the execution of the said patent.

The court admitted the patent in evidence.

Objection overruled; defendant excepts.

A. C. A.

Plaintiff then offered in evidence a stipulation filed February 10th, 1873.

EXHIBIT C.

(Title of court and cause.)

The following facts are admitted to be true, and this stipulation may be offered as evidence by either party:

First. That the township plat of township ten north, range eight east, Mount Diablo meridian, as approved by L. Upson, U. S. surveyor-general for California, was filed in the U. S. land-office at Marysville, California, on the 16th of June, 1866.

Second. That the land in controversy was, on the 16th of June, 1866, in the Marysville land-district, and is now in the Sacramento land-district.

74 Third. That the patent from the U. S. Government to the Central Pacific Railroad Company of the odd sections in township ten north, range eight east, M. D. M., was issued on the 27th of June, 1867.

Fourth. That at the time of the commencement of this action the defendant was and is still a corporation as alleged in the complaint.

GEORGE E. WILLIAMS,
Attorney for Plaintiff.
C. G. W. FRENCH,
Attorney for Defendant.

Filed February 10th, 1873.

R. O. TURNBULL, *Clerk.*

Also, stipulation filed February 11th, 1873.

EXHIBIT D.

(Title of court and cause.)

It is stipulated that township ten north, range eight east, M. D. M., was surveyed and sectionized by the U. S. Government prior to the 19th of May, 1866, and that on that day the survey was approved by the U. S. surveyor-general for California; and it is further stipulated that on the 28th of September, 1866, the register of the U. S. land-office at Marysville, the land-district in which said lands were situated, certified to the

75 State land-office that there were no claims filed on the sixteenth section of said township, except the pre-emption claim number three thousand six hundred and fifty of John Hancock for west half of

northwest quarter section sixteen; and it is further stipulated that said Hancock subsequently abandoned said pre-emption claim.

C. G. W. FRENCH,
Attorney for Defendant.
GEORGE E. WILLIAMS,
Attorney for Plaintiff.

Filed February 11th, 1873.

R. O. TURNBULL, *Clerk.*

Plaintiff then offered in evidence Exhibit E.

EXHIBIT E.

CENTRAL PACIFIC RAILROAD COMPANY OF CALIFORNIA. NO. 106. LAND DEPARTMENT.

Article of agreement made at Sacramento, California, this 16th day of October, A. D. 1866, between the Central Pacific Railroad Company of California, party of the first part, and B. N. Bugbey, of Sacramento County, California, party of the second part.

The said party of the first part, in consideration of the agreements of the said party of the second part herein contained, hereby agrees
76 to sell unto the said party of the second part the following tract of land, situate in the county of El Dorado, California, to wit, and known and designated on the public surveys of the United States as the northeast quarter of the northwest quarter of section number twenty-one, township number ten north, range number eight east, Mount Diablo base and meridian, containing forty acres, for the sum of fifty dollars, United States currency, of which sum the said party of the second part has this day paid the sum of ten dollars, with one year's interest on the remainder of said purchase-money, the remainder of said principal sum, amounting to forty dollars, United States currency, with interest thereon annually, in advance, at the rate of ten per cent. per annum, to be paid by the said party of the second part on or before the 16th day of October, 1871.

And the said party of the first part hereby further agrees that, upon the punctual payment of said purchase-money and interest, and the strict and faithful performance by the said party of the second part, his legal representatives or assigns, of all the agreements herein contained, then the said party of the first part will, after the receipt of a patent therefor from the United States, cause to be made and executed to the said party of the second part, his heirs and assigns, upon request
77 and the surrender of this contract, a deed in fee-simple for the conveyance of said premises, reserving, however, a strip of land four hundred feet wide, lying equally on each side of the track of railroad of said company or any branch thereof now or hereafter constructed thereon for a right of way or other railroad purposes, reserving, also, all claim of the United States as mineral land.

And the said party of the second part hereby agrees to pay to the said Central Pacific Railroad Company of California, its successors or assigns, the said sum of forty dollars United States currency, with interest thereon annually in advance, at the rate of ten per cent. per annum, at its office in the city of Sacramento, on or before the 16th day of October, 1871, both principal and interest payable in United States currency, and will also pay all the taxes and assessments imposed on said premises; and until the full payment of said purchase-money and

interest will permit no strip or waste to be made on said premises, and no wood or growing trees to be cut thereon, except for necessary fuel for the family and for the erection of buildings or fences, without the previous written consent of the said party of the first part; and if the said party of the second part shall fail to punctually make any of said payments of interest or principal, or shall fail to strictly comply with any of the stipulations of this contract, then the said party of the
78 first part, its successors or assigns, shall have the right to enter upon and take possession of the said premises, with all the improvements thereon.

In testimony whereof the said party of the first part has caused these presents to be signed by its secretary and land-agent, and the said party of the second part has signed his name hereto.

B. B. REDDING,
Land-Agent.
E. H. MILLER, J'R,
Secretary.
B. N. BUGBEY.

Defendant objected to the same as irrelevant, incompetent, and immaterial; that it does not purport to be a conveyance; further, that it is not shown that any of the conditions have been complied with, or that any title was in the Central Pacific Railroad Company.

Objection overruled. Exhibit E admitted. Defendant excepted.

Plaintiff offered a deed marked "Exhibit F." Defendant objected as being irrelevant, incompetent, and immaterial; that it appears to be an instrument executed two years after the commencement of this suit; that it is a title acquired subsequent to the commencement of this suit; that it is not shown that the grantor had any title or claim to this property; that it is not shown that the grantor was authorized by the
79 company he purports to represent to execute the conveyance, and that the acknowledgment of the paper is insufficient to entitle it to record.

Objection overruled by the court. Defendant excepts.

A. C. A.

EXHIBIT F.

Know all men by these presents that the Central Pacific Railroad Company of California, in consideration of the sum of two hundred and forty dollars, to it paid by B. N. Bugbey, of Sacramento County, California, the receipt whereof is hereby acknowledged, hereby gives, grants, bargains, sells, and conveys to the said B. N. Bugbey, his heirs and assigns, the following-described tracts of land, situate in El Dorado County, California, to wit, the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-one, township ten north, range eight east, and the northeast quarter of the northwest quarter of section number eleven, in township nine north, of range nine east, Mount Diablo base and meridian, containing one hundred and sixty acres, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining
80 and belonging; and also reserving all claim of the United States to the same as mineral land. To have and to hold the aforesaid premises to the said B. N. Bugbey, his heirs and assigns, to his and their use and behoof, forever.

In testimony whereof the said Central Pacific Railroad Company of California has caused these presents to be signed by its president and

secretary, and sealed with its corporate seal, this 9th day of June, A. D. 1870.

[SEAL.] LELAND STANFORD,
President.

E. H. MILLER, J'R, *Secretary.*

STATE OF CALIFORNIA,
County of Sacramento:

On this 9th day of June, A. D. 1870, personally appeared before me, a notary public in and for said county, Leland Stanford, president, and E. H. Miller, j'r, secretary, of the within-named Central Pacific Railroad Company of California, known to me to be the persons described in and who executed the foregoing instrument as such officers of said company, who acknowledged to me that they executed the same freely and voluntarily, as the free act and deed of said company, and for the uses and purposes therein mentioned.

81 Witness my hand and official seal the day and year aforesaid.

CHARLES J. TORBERT,
Notary Public in and for Sacramento County, State of California.

When plaintiff asked the witness, B. N. Bugbey: State whether you know by general report of the existence of a corporation in this State known as the Central Pacific Railroad Company.

(Defendant objected as irrelevant, incompetent, and immaterial; that it is hearsay, and that the existence of a corporation cannot be proved by general reports.

Objection overruled; defendant excepted. Exhibit F admitted.)

Answer. I do.

Question by plaintiff. You are acquainted with Leland Stanford?

A. I am.

Q. State if you know what position he occupied in that corporation known as the Central Pacific Railroad Company of California on the 9th of June, 1870.

(Defendant objected as incompetent, irrelevant, and immaterial, and hearsay.

Objection overruled; defendant excepted.)

In section sixteen, the ditch passes through my entire vineyard, lying on one side of the ditch, and one-third on the other side. On the

82 land occupied by the ditch I could produce at least eight tons of grapes to the acre, and they are worth twenty dollars per ton.

Plaintiff here rested his case.

Whereupon defendant moves for a nonsuit generally, and also upon the following grounds:

First. That the defendant being in possession of the land plaintiff has not shown any possession to overcome defendant's title.

Second. That plaintiff has shown no title in himself to the land in controversy.

Third. That the plaintiff has failed to overcome, by his evidence, defendant's right of possession.

Fourth. This being an action of ejectment, the same does not lie to try the right of way, or the right of defendant's easement in the premises; that the action is not properly brought.

Fifth. That an action of ejectment has no remedial relation to defendant's right in the premises sued for.

Counsel for the defendant added upon the grounds of the objections made to the patent offered in evidence, and renewed his objection thereto.

The court overruled the defendant's motion for nonsuit, and defendant duly excepted, and now assigns the same as error in law.

83 *Defense.*

Whereupon the defendant introduced the following evidence, to wit, the instruction of the General Land-Office, at Washington, D. C., upon the withdrawal of and declaring certain lands as mineral in character, and not agricultural. The following is the instruction:

WASHINGTON, *December 2d*, 1872.

Register and Receiver, Sacramento, California:

Gentlemen: Under the authority of the honorable Secretary of the Interior, you are hereby directed to withhold the lands in the following designated townships on your district from disposal under laws only applicable to agricultural land, until the now mineral character of the same shall have first been satisfactorily established at a hearing to be had before you, after due notice, in the manner set forth in the circular herewith, dated 16th May, 1871. This course has been forced upon the Department by several circumstances, among which may be cited the fact that the majority of applications for mining titles from California are for lands marked agricultural upon the official township plats; that in making these returns of surveys large arrears in the heretofore reserved mineral belts are marked on the plats as agricultural lands,

84 while upon the same plats, and within the tracts so returned as agricultural, are annotations of quartz ledges, mining ditches, hydraulic mines, diggings, etc., the plat thus contradicting itself, and leaving this office in the dark as to the true quality of the land. In a case now pending before this office of application for a patent for a quicksilver mine, one which had been worked for years, it was found that the land was returned as agricultural, and falling within the limits of the grant was patented to the Western Pacific Railroad Company before said application was received. Experience having shown that this office cannot, with any degree of safety, judge of the character of these lands from the data furnished by such returns, and there being no authority of law for the employment of competent geologists to investigate the matter, the head of the Department has, in consideration of the publications, and to protect the indiscriminate absorption of the mineral land of the public domain through the instrumentality of insufficient returns, found it imperatively necessary to adopt the course herein announced, both for the protection of the parties who have already spent time, capital, and labor in developing mines, and those of the citizens of the United States who may hereafter desire to exercise their legal right to do so.

(Here followed a list of the townships to which this order applied, amongst which was township number ten north, range eight east.)

85 Plaintiff objects to the above as incompetent, irrelevant, and immaterial; further, that it does not tend to prove any issue in the case. Plaintiff's objection was sustained, the evidence excluded, and defendant excepted.

Defendant offers in evidence the following deed from plaintiff to the Pacific Mutual Life-Insurance Company:

EXHIBIT J.

This indenture, made the 8th day of June, one thousand eight hundred and seventy, between Benjamin N. Bugbey, of El Dorado County, State

of California, party of the first part, and the Pacific Mutual Life-Insurance Company of California, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of fifteen thousand dollars, gold coin, to him in hand paid by the said party of the second part, at or before the executing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, and sell unto the said party of the second part, and to its heirs and assigns forever, all of the following parcels or tracts of land lying in the county of El Dorado, State of California, and known and described as follows, to wit,
86 thes outheast quarter (S. E. ¼) and the east half (E. ½) of the southwest quarter, (S. W. ¼,) and the northwest quarter (N. W. ¼) of the southwest quarter, (S. W. ¼,) and the easterly triangular half of the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section sixteen, (16,) township ten (10) north, range eight east, (R. 8 E.;) also, the northeast quarter (N. E. ¼) of the northwest quarter (N. W. ¼) of section twenty-one, township ten (10) north, range eight east, (R. 8 E.,) excepting a triangle of seven (7) acres in the northeast corner of southwest quarter (S. W. ¼) of section sixteen, (16;) together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

B. N. BUGBEY. [SEAL.]

Signed, sealed, and delivered in the presence of—
E. I. ROBINSON.

STATE OF CALIFORNIA,
County of Sacramento:

On this 8th day of June, A. D. one thousand eight hundred and seventy, before me, A. Comte, j'r, a notary public duly appointed
87 and residing in said county, personally appeared E. I. Robinson, personally known to me to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who, being by me duly sworn, deposed and said that he resides in Sacramento County; that he was present and saw B. N. Bugbey, known to him to be the same person described in and who executed the same freely and voluntarily and for the uses and purposes therein mentioned, and that he (the deponent) thereupon signed his name as a subscribing witness thereto.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] A. COMTE, J'R,
Notary Public.

Filed June 20th, 1870, at 2 o'clock p. m.
Recorded June 21st, 1870, at 10.45 o'clock a. m.

W. N. MURPHY,
County Recorder,
By W. M. DONOHUE,
Deputy.

Plaintiff objects to the deed as evidence, on the ground that it is incompetent, irrelevant, and immaterial; further, that it tends to prove no issue in the case; further, that the answer of defendant does not set out or plead any title in a third party, or a conveyance of the
88 property to a third party by plaintiff, the answer of defendant being filed at a later date than the date of the alleged conveyance offered in evidence.

Objection overruled, and plaintiff excepted.

H. T. Knight, recalled as a witness for defendant:

I am now and have been continuously the superintendent and managing agent of defendant ever since 1866, and have had the sole charge of its property.

Question by defendant. Have you read the description of the land embraced in the deed from plaintiff, B. N. Bugbey, to the Pacific Mutual Insurance Company?

Answer. Yes, sir.

Q. State whether the land in controversy is embraced within the limits of the land conveyed in that deed.

A. It is.

Q. State if notice was given to the defendant of M'r Bugbey's application for any portion of this section sixteen.

(Objected to by plaintiff as incompetent, irrelevant, and immaterial; that the defendant has not connected itself in any way with the title to the land; further, that it is a collateral attack upon the patent from the State of California to plaintiff; that it can only be proved by received testimony; that oral testimony is inadmissible for that purpose.
89 Objection overruled. Defendant excepts.)

Q. State if any notice was ever published by Bugbey that the patent was to be issued that had been applied for to any portion of that ground.

(Same objection as above. Objection overruled. Plaintiff excepts.)

A. I have never heard of any such thing.

Defendant here offered in evidence the following affidavit for location, number three hundred and seventy-six:

EXHIBIT K.

Affidavit for location.

I, Benjamin N. Bugbey, of El Dorado County, State of California, being duly sworn, depose and say: That I, Benjamin N. Bugbey, am a citizen of the United States and a resident of the State of California, of lawful age; that I am an applicant for the purchase and location of the above-described lands; that the same are unoccupied by any person other than myself; and that, to the best of my knowledge and belief, there is no valid claim existing upon the land so described adverse to the claim I hold and apply to be located, and that there is no improvement of any description on said land other than my own.

Witness my hand.

BENJAMIN N. BUGBEY.

90 Sworn and subscribed to before me this 27th day of January, A. D. 1866.

E. I. ROBINSON,
Notary Public.

We, A. W. Mars, L. L. Morrill, and E. A. Jones, of El Dorado County, State of California, being duly sworn, each for himself deposes and says: That he is acquainted with the lands described in the above application and sought to be located by the above-named Benjamin N. Bugbey; that there is no valid claim existing upon the land so described adverse to the claim above named, nor any improvements other than those owned by the said applicant, to the best of his knowledge and belief, and that he neither has nor expects to have any interest, directly or indirectly, in the claim so desired to be located by said Benjamin N. Bugbey.

Witness our hands.

A. W. MARS.
L. L. MORRILL.
E. A. JONES.

Sworn to and subscribed before me this 27th day of January, A. D. 1866.

[SEAL.] E. I. ROBINSON,
Notary Public.

Defendant offers in evidence the following grant of the sixteenth and thirty-sixth sections for school purposes:

(Objected to by plaintiff, on the same grounds as above. Objection sustained; the evidence rejected; to which ruling defendant excepted.)

91 H. T. Knight testifies that there has been mining on the river in section sixteen for many years; that there is an extensive and valuable mining-claim there.

Rebuttal.

B. N. Bugbey, recalled:

Mr WILLIAMS. Do you know the Pacific Mutual Life-Insurance Company?

Answer. Yes, sir.

Q. State whether or not it was a corporation on the 8th day of June, 1870.

A. Yes. I do not know when they were incorporated. I know they were incorporated at that time.

Q. You were the party who executed the deed that has been offered in evidence? (Exhibit J.)

A. Yes, sir.

Q. State for what purpose that deed was executed; if it was an absolute deed or as a mortgage.

(Defendant objects to the question, on the ground that the deed itself is the best evidence of what it contains, and that a written instrument cannot be varied by parol evidence; further, as incompetent and irrelevant.)

A. It was a mortgage.

Q. At the time of the execution and delivery of that instrument, do you recollect getting a defeasance back from them?

92 A. Yes; I borrowed a considerable sum of money from them. I gave them a trust-deed, and they gave me an instrument by which, on the payment of the money thus borrowed, the property would be released, the deed I gave them null and void. That instrument they gave me some short time after I executed the deed, or perhaps it was at the same time.

Q. Who was the vice-president of the company at that time?

A. Howard Hastings.

Q. Who was the secretary?
A. Joseph Crackbon.
Q. Is this the instrument you refer to? (Showing the witness a paper.)
A. Yes, sir.
Q. Whose signatures are those on the instrument?
A. That is the signature of Howard Hastings, and that is the signature of Joseph Crackbon. I know both their signatures.

Counsel for plaintiff offers the instrument in evidence; which reads as follows:

"Know all men by these presents, that the Pacific Mutual Life-Insurance Company of California has this day received from Benjamin N. Bugbey a deed, absolute upon its face, to the following-described
93 property, to wit, all of the following parcels or tracts of land, lying in the county of El Dorado, State of California, and known and described as follows, to wit: The southeast quarter and the east half of the southwest quarter, and the northwest quarter of the southwest quarter, and the easterly triangular half of the southwest quarter of the southwest quarter of section sixteen, township ten north, range eight east; also, the northeast quarter of the northwest quarter of section twenty-one, township ten north, range eight east, except a triangle of seven acres in the northeast corner of the southwest quarter of section sixteen, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining.

"Now, therefore, the said company hereby acknowledges that said deed was given and accepted as a mortgage, to secure the payment of a promissory note given by the said Benjamin N. Bugbey to said company, of even date herewith, and covenants and agrees upon the payment in gold coin by said Bugbey of said note, and all its interest thereon, and all taxes, assignments, and liens which, for its own security, it may have paid upon said real estate, to execute and deliver to the said Bugbey, his heirs and assigns, a good and sufficient deed, reconveying to him said property.

94 "In testimony whereof the said company have caused this agreement to be signed by its president and secretary and sealed with its corporate seal, this 8th day of June, 1870.

"H. F. HASTINGS,
"*Vice-President and President pro tem.*
"JOSEPH CRACKBON,
"*Secretary.*"

Defendant objects to the instrument as evidence in the case, on the ground that it is incompetent, irrelevant, and immaterial.

Objections overruled. Defendant excepts.

Marked, "Exhibit L."

Defendant moves that the oral evidence relating to the instrument be stricken out, the instrument being received in evidence.

The court ruled that the oral evidence in relation to the deed being a mortgage, be stricken out.

B. N. Bugbey. Examination resumed:

M'r WILLIAMS. This ground in controversy on the south half of section sixteen; state what you know, whether it is mineral or non-mineral in character.

Answer. It is non-mineral.

Q. State what facts you know in regard to the non-mineral character of that ground.

A. I have dug a ditch that would average six feet in width to the old bed-rock, right from the road that leads from Red Banks to
95 McDowell Hill, to a point by the Ditch Company's flume, crossing Burn's ravine, anticipating that we might find something when we commenced digging. I had the men that did the digging prospect it thoroughly; but we never, to my knowledge, found the color. We have prospected every part of the ground in the enclosure that contains my vineyard, but could find nothing. To follow the meanderings of that ditch through this land, it must be three-eighths of a mile; may not be quite so much.

Q. What portion of the ditch is in the southwest quarter of section sixteen?

A. The principal portion of it is in the southwest quarter; the middle line here ( ) runs directly through my house, occupied by the men on the ranch or vineyard.

Q. I understand you to say you have had other prospecting done on that south half of section sixteen?

A. Yes.

Q. And that you have not been able to find gold there?

A. We have not been able to find gold there. There was, over on the river, in early days, the appearance of some mining, but it has not been worked there for a long time. I think it was in February, 1862, that I purchased the place, and there has not been any mining
96 done there, on the south half of section sixteen, since that time, with the exception that some Chinamen came and worked in Brown's Ravine for three or four days, or perhaps a day or two longer, and then left. They did not make anything, I suppose; I did not have any conversation with them.

Q. In the northeast quarter of the northwest quarter of section twenty-one, township ten north, range eight east, is there mining-ground there?

A. There is no more show for mineral there than there is down in the Sacramento Valley. It is in a mineral region, but that is all; there is no mineral there.

Q. What is the character of the ground?

A. It is good agricultural land; it runs up on to the top of a hill; I built a house right straddle of the north and south line.

Q. Has there ever been any prospecting done on that northeast quarter of the northwest quarter of section sixteen?

A. Yes; prospecting has been done there a good deal; they have never been able to find gold in it—not a scale.

Cross-examination:

M'r BLANCHARD. How much of the South Fork of the American River is there on the south half of section sixteen; along its banks, how far is it?

97 Answer. It may be a hundred yards; it crosses the river.

Q. There is nearly half a mile in the south half of section sixteen, on the south fork of the river, nearly half a mile long. The South Fork of the American River is entirely in it. (Showing the map.)

A. (Showing on the map.) Here is the south half of section sixteen, and there is a little corner. It seems to me that there is more on this map than there is when you get down on the river. A man of the name of Hancock had mined in the bed of the river a long time ago, but he has not mined there two days for five years or more, or attempted to mine it. He has prospected it thoroughly.

Q. I ask you if, in the south half of section sixteen, on the river, if there is any mineral there?

A. There is nothing that could pay for working.

Q. Did you ever mine there?

A. No; but I have been down there, and know the character of the ground. The character of it is that it is bed-rock, worn as smooth as it is possible to be.

Q. Is there any bed-rock there in the river?

A. Yes; it is smooth bed-rock. There is a very narrow space where the water flows rapidly. It shows clear down to the bed-rock.

98 Q. You say there was mining-ground on the north half of the section?

A. I do not know about mining-ground there, except at (the) McDowell's Hill there used to be a mining-camp. I know that on the northwest quarter of this section sixteen there has been mining, but I do not know there has been any mining in the northeast quarter of the section, and I do believe there has been. On the northwest quarter of the section there used to be mining-ground.

Q. How long has Hancock owned a claim there?

A. I could not say.

Q. For ten or fifteen years?

A. He has not mined there for a long time. He used to get Chinamen to work there. They would leave him after a short time.

Q. Do you know that Hancock's claim there is one of the richest claims in the river?

A. It would be rather singular if it was a rich claim, when the man has been nearly starved and is very poor. He has tried to get me to go in as a partner with him; I would not do it. The claim has never been known to pay.

E. A. JONES sworn:

Mr WILLIAMS. Are you acquainted with the agricultural and mineral character of the south half of section sixteen, township ten north, range eight east?

99 Answer. I am.

Q. State whether that land is agricultural or mining land.

A. It is agricultural land.

Q. How many years have you been there engaged in agricultural pursuits?

A. I think it was in the winter or the spring of 1865.

Q. You have been engaged in agricultural pursuits on that land ever since that time?

A. Yes, sir.

Q. State if at any time you have prospected for mineral on any part of that land. If so, with what success?

A. I have prospected in different parts of the vineyard, above and below the ditch. I never found even the color of gold in any of my prospecting there, and I have seen other persons prospect there, but I never knew them to find any gold at all there.

Q. Has there been any mining done on that south half of section sixteen except what you have done yourself?

A. There was none, except it was near the river.

Q. That would be on the extreme west side of the south half of section sixteen?

A. Yes.

Mr BLANCHARD. You do not know where the lines are?

100 M'r WILLIAMS. Did you ever see the lines run?

A. I never saw them run.

Q. Have you seen the stakes?

A. I have seen some stakes there.

Q. Did you ever see prospecting done upon the northeast quarter of the northwest quarter of this section twenty-one, on that triangular piece?

Q. I do not exactly understand where it is.

Q. In that neck of land (showing on the map) on the northeast quarter of the northwest quarter of section twenty-one?

A. I have prospected in there.

Q. Did you prospect there for gold?

A. Yes, sir.

Q. What was your success?

A. Nothing at all.

Q. You could not find anything?

A. Nothing at all.

Cross-examination:

Mr. BLANCHARD. How much prospecting did you do?

A. I prospected there at different times and in different places, for my own satisfaction.

Q. Where did you prospect? Tell the places.

A. I prospected among the vines there, both above and below the ditch.

Q. Away up on that bed-rock hill, where Bugbey's house was?

101 A. I think there are no vines where the house stood. There are some vines below it.

Q. Are there vines on that hill where Bugbey's house stood?

A. There are none where the house stood; there are vines on either side of the hill.

Q. Did you prospect there?

A. I prospected on the sides of that hill.

Q. On which side?

A. On the side towards Henry Metly's land, and also down to Brown's Ravine—that way.

Q. How near to Brown's Ravine did you prospect?

A. In the ravine, and for two hundred or three hundred yards beyond it.

Q. Did you find any gold in Brown's Ravine?

A. No; no gold; not even the color.

Q. Have you ever mined?

A. Not lately; but I have mined in California for nearly twelve years. It was my business principally when I first come to the country.

Q. You do not know what mining has been done there on the river?

A. I have never seen any mining there that would pay.

Q. Do you know a man called Hancock down there?

A. I only know him by sight.

Q. Have you ever been down at his place?

102 A. I could not say where he lives; sometimes he is in one place, and sometimes in another. Where his house is I could not say.

Q. Has not Hancock got a rich claim there—a claim where he has made a fortune?

A. If he has made a fortune there, it is something of news to everybody in that part of the country; I never heard any one speak of Hancock having made a fortune there.

Q. Did you ever hear any one speak of Hancock's claim there being a rich claim?

A. I never heard of his making a fortune; I have heard that at one time he considered the claim was rich; but not at the present time.

Q. He does not consider it a rich claim now?

A. As far as I know, he does not.

Q. What do you know about it?

A. Only from hearsay.

Q. Have you ever been down on the river there?

A. I have been; yes.

Q. Did you ever mine there?

A. I never mined there, for I never saw anything there worth mining for.

Q. On section sixteen?

A. On section sixteen.

Q. Is not Hancock waiting to get in his claim; waiting for the water to fall so that he can work the claim?

103 A. He has been living in that neighborhood for a number of years, but as to his waiting for the water to fall in the river to work any claim, I do not know anything about.

Q. Is his claim on section sixteen?

A. Somewhere in that neighborhood; I could not say exactly where it is.

JAMES E. HENRY, recalled:

M'r WILLIAMS. Have you worked upon the land adjacent to this land in controversy in the vineyard?

Answer. Yes, sir.

Q. Have you done any prospecting for gold on that land?

A. I have.

Q. How much prospecting have you done there?

A. I have prospected there one and a half days.

Q. Where was it?

A. The first day I prospected there, that was about three months ago; I prospected there in forty or fifty places.

Q. What was the result of your prospecting there?

A. I could not get any gold; I could not even get the color.

Q. Where did you prospect?

104 A. I went above the ditch about one hundred and fifty feet, and prospected along on the hill right across.

Q. Did you go to the places where you thought it was the most probable you would find gold?

A. I did.

Q. Where else did you prospect?

A. I prospected down Brown's Ravine; I did not find anything in Brown's Ravine; then I prospected on the other side of the flume, and in the vineyard.

Q. You say you prospected there in some forty or fifty different places, where you thought you would be the most likely to find gold?

A. Yes.

Q. And in that prospecting you did not find any gold?

A. I could not find any.

Cross-examination:

M'r BLANCHARD. Do you know Hancock?

Answer. No, sir.

Q. Do you know his claim?
A. No.
Q. You prospected there, you say, about three months ago?
A. Yes.
Q. Did you wash your tailings in the defendant's ditch?
105 A. Sometimes I did; not much. I washed the most of them in Brown's ravine.
Q. How did you happen to go there to prospect for gold?
A. I prospected in Brown's ravine of my own accord, just to see if I could find anything there.
Q. Did M'r Bugbey tell you to prospect there?
A. No, he never did.
Q. You prospected there in forty or fifty different places?
A. I did.
Q. How far below the still-house did you prospect?
A. About twenty feet below the still-house; then I went up to where the cooper-shop is.
Q. Did you go up as far as the wine-cellar?
A. In the first place I went down below the wine-cellar.
Q. Did you prospect there?
A. No.
Q. Did you prospect in any other place?
A. Yes; along the line of the ditch.
Q. Where is there a place likely to find gold along the line of the ditch? Do you know where Burns' ravine is?
A. Yes; it runs along the flume in this way. (Showing on the map.)
Q. You only prospected there about three or four months ago?
106 A. Yes, that is all.
Q. You do not know Hancock's claim?
A. I do not.
Q. You never prospected down in the bed of the river there?
A. No.

Whereupon, the testimony being closed, the case was argued by the respective counsel, and submitted to the court.

Assignment of errors.

I.

Errors in law occurring at the trial and excepted to by defendant:

First. The court erred in overruling defendant's first motion for a continuance, February 10th, 1873.

Second. The court erred in denying the defendant's second motion for continuance, February 24th, 1873.

Third. The court erred in admitting the patent from the State of California in evidence.

Fourth. The court erred in admitting Exhibit E in evidence.

Fifth. The court erred in admitting deed Exhibit F in evidence.

Sixth. The court erred in admitting oral proof of the existence
107 of the corporation "The Central Pacific Railroad Company," and who its officers were.

Seventh. The court erred in refusing defendant's motion for nonsuit.

Eighth. The court erred in rejecting as evidence the instructions of the Commissioner of the General Land-Office at Washington, D. C., to the register and receiver of land-office at Sacramento.

Ninth. The court erred in rejecting as evidence the affidavit for location number three hundred and seventy-six and attached papers.

Tenth. The court erred in rejecting as evidence Exhibit K.

Errors in relation to findings.

First. The court erred in the eighth finding, to wit, that defendant's possession of said lands was not adverse to plaintiff's and his grantor; also, that plaintiff and his grantor did not acquiesce in defendant's possession, because the evidence shows that defendant's possession was adverse to plaintiff and his grantor; also, that they each did acquiesce in defendant's possession.

Second. The court erred in that portion of the tenth finding wherein it finds that defendant did not hold said lands adversely; because the evidence shows that defendant held the same adversely to all persons and parties.

108 Third. The court erred in inserting in the fourteenth finding the words "but not on section sixteen;" further, evidence shows that there are valuable gold-mines on said section sixteen.

Fourth. The court erred in the fifteenth finding, in not finding that defendant held said land, as to title, against the United States and every person and party.

Fifth. The court erred in finding so much of the seventeenth finding as occurs after the words "except as against the title," for the same reasons as last above.

Sixth. The court erred in making the nineteenth finding, for the evidence shows that no notice was ever given.

Seventh. The court erred in making the twentieth finding, because the evidence shows that plaintiff's application to purchase section sixteen was before the survey.

Eighth. The court erred in so much of the twenty-second finding as finds that defendant's right to this land was not acquired by grant from the United States and this State.

Ninth. The court erred in so much of the twenty-third finding as finds that the deed therein mentioned was a mortgage.

Tenth. The court erred in making all the twenty-sixth finding except the last three lines of the same.

109 Eleventh. The court erred in making the thirty-second finding.

Twelfth. The court erred in law in so much of the thirty-ninth finding as finds that said conveyance was in accordance with said acts.

Conclusions of law.

First. The court erred in its conclusions of law and decision as to lands sued for on section sixteen.

Second. The court erred in rendering judgment for said plaintiff, but should have rendered judgment for said defendant for said lands in the sixteenth section.

I hereby certify that the foregoing bill of exceptions is this day settled, and that it is correct and allowed.

In witness whereof I do hereunto, on this 17th day of May, A. D. 1873, in open court, set my hand.

A. C. ADAMS,
District Judge of the Eleventh Judicial District, State of California.

Filed May 17th, 1873.

R. O. TURNBULL, *Clerk.*

Notice of motion for a new trial.

(Title of court and cause.)

The above-named plaintiff and his attorneys and the clerk of
110 said court are hereby notified that the above-named defendant intends to and will move the above-named court to set aside the judgment and for a new trial in the above-entitled action, and upon the following grounds, to wit:

First. Irregularity in the proceedings of the court, adverse party, and orders of and abuse of discretion of the court, by which defendant was prevented from having a fair trial.

Second. Newly-discovered evidence, material for the defendant, which it could not with reasonable dilligence have discovered and produced at the trial.

Third. Insufficiency of the evidence to justify the decision of the court in said cause, and that decision of said court in said cause is against law.

Fourth. Errors in law occurring at the trial of said cause and excepted to by defendant.

Said motion for said new trial will be brought on for hearing at the court-room of the said district court, in the court-house at Placerville, in the said county of El Dorado, on the 17th day of May, 1873, at 10 o'clock a. m. of that day, or as soon thereafter as the same can be heard by said court.

C. G. W. FRENCH AND
GEO. G. BLANCHARD,
Attorneys for Defendant.

Filed May 3d, 1873.

R. O. TURNBULL, *Clerk.*

111 *Order overruling motion for new trial.*

(Title of court and cause.)

In this case defendant's motion for a new trial coming on regularly to be heard on Saturday, the 17th day of May, 1873, in open court, at the regular May term of said court for said year, George E. Williams and G. J. Carpenter appearing for the plaintiff, and George G. Blanchard appearing for the defendant, the following papers and exhibits, to wit:

Affidavit of H. T. Knight, filed November 18th, 1872; affidavit of H. T. Knight, filed November 29th, 1872; affidavit of H. G. Livermore, filed November 29th, 1872; affidavit of C. G. W. French, filed November 18th, 1872; affidavit of George G. Blanchard, filed 18th of November, 1873; stipulation of Robert Robinson, attorney for plaintiff, and C. G. W. French, attorney for defendant, filed November 14th, 1872; affidavit of B. N. Bugbey for land location, sworn to and subscribed January
27th, 1866, with affidavit of A. A. Neavs, L. L. Morrill, and J. A.
112 Jones, appended; patent from the State of California to B. N. Bugbey, dated April 22d, 1867; contract for a deed from Central Pacific Railroad Company to B. N. Bugbey, dated October 16th, 1866; conveyance from B. N. Bugbey to the Pacific Mutual Life-Insurance Company, dated June 8th, 1870; the bills of exceptions settled and filed in the case, and all pleadings, papers, and exhibits mentioned in said bills of exceptions, together with defendant's notice of motion for a new trial, filed May 3d, 1873, were used on said motion for a new trial, and

all of which pleadings, papers, exhibits, bills of exceptions, and said notice are made a part of the statement in said case, and are herein referred to.

The motion was duly argued by the respective attorneys, submitted, and by the court taken under advisement.

And now at this time, the court being fully advised in the premises, it is ordered and adjudged that said motion be overruled and denied, for the reason that no error appears in the record of said action, and that the proper judgment has been entered herein.

To which decision and order overruling and denying said motion for a new trial the said defendant excepts.

Dated May 19th, 1873.

A. C. ADAMS,
District Judge of the Eleventh Judicial District, State of California.

113 Filed May 19th, 1873.

R. O. TURNBULL, *Clerk.*

Notice of appeal.

(Title of court and cause.)

You and each of you will please take notice that the defendant in the above-entitled action appeals to the supreme court of the State of California from the decision and judgment of said district court in the above-entitled action, which said judgment, bearing date of May 4th, 1873, was filed and entered in said court on the 8th day of April, A. D. 1873, in favor of the said plaintiff in said action and against the said defendant therein. Said appeal is taken from the whole of said judgment, and from all orders, rulings, and decisions therein against defendant, and also from the order of said court denying defendant's motion for a new trial in said action; which said order was made and entered in said district court on the 19th day of May, 1873.

C. G. W. FRENCH AND
GEO. G. BLANCHARD,
Attorneys for Defendant.

To the clerk of said district court and B. N. Bugbey, plaintiff, and his attorneys, J. G. Carpenter and Geo. E. Williams.

114 Service of the within notice of appeal is hereby acknowledged by copy, this 19th day of May, 1873, after filing.

G. J. CARPENTER AND
GEO. E. WILLIAMS,
Attorneys for Plaintiff.

Filed May 19th, 1873.

R. O. TURNBULL, *Clerk.*

Appeal bond.

(Title of court and cause.)

Whereas the Natoma Water and Mining Company, the defendant in the above-entitled action, is about to appeal to the supreme court of the State of California from a judgment made and entered against it in the said action in the said district court in favor of the said plaintiff in the said action on the 8th day of April, in the year 1873, for the recovery of the possession of certain lands and premises therein described, and fifty-nine dollars for value of rents and profits of said premises, and one hundred and eight dollars and fifty cents costs of suit; which said

judgment bears date of April 4th, 1872: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned,
115 John Bennett, of the village of Mormon Island, in the said county of Sacramento, farmer, and William Jarvis, of the village of Folsom, in same county of Sacramento, farmer, do hereby jointly and severally undertake and promise, on the part of the said appellant, that the said appellant will pay all damages and costs which may be awarded against it on the said appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. And whereas the said appellant is desirous of staying the execution of the said judgment so appealed from as to the said costs and damages, rents and profits, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of three hundred and fifty dollars, (being double the amount named in the said judgment for said costs, rents, and profits and damages,) that if the said judgment appealed from or any part thereof (in that respect) be affirmed or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment is affirmed, if affirmed only in part, and all damages, rents, and profits, and costs which may be awarded against the said appellant upon the appeal.
116 And whereas the said appellant is desirous of staying the execution of the said judgment so appealed from, in so far as relates to the possession of the said land and premises, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of five hundred dollars, (being the amount for that purpose fixed by the judge of the said court by which the said judgment was rendered,) that during the possession of such said property by the appellant it will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed or the appeal be dismissed, it will pay the value of the use and occupation of the said property from the time of the said appeal until the delivery of the possession thereof, pursuant to the said judgment, not exceeding the said sum of five hundred dollars as aforesaid, fixed by the judge of the said court by which the said judgment was rendered.

Dated this 12th day of May, A. D. 1873.

JOHN BENNETT. [SEAL.]
W'M JARVIS. [SEAL.]

STATE OF CALIFORNIA,
County of Sacramento:

John Bennett and William Jarvis, the persons named in and who executed the foregoing undertaking as the sureties thereto, being
117 each severally and duly sworn, each for himself says that he is worth double the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and is a resident of said county and State.

JOHN BENNETT.
WILLIAM JARVIS.

Subscribed and sworn to before me this 12th day of May, 1873.
[SEAL.] W. C. CROSETT,
Notary Public.

Approved and filed May 19th, 1873.

R. O. TURNBULL, *Clerk.*

(Title of court and cause.)

It is hereby stipulated that the foregoing is a true and correct transcript on appeal, and may be used as such on the appeal in said cause in the supreme court without further certificate or identifycation; and service of the same, by copy, is hereby acknowledged this 26th day of June, A. D. 1873.

G. J. CARPENTER AND
GEO. E. WILLIAMS,
Att'y for Respondent.
GEO. G. BLANCHARD AND
C. G. W. FRENCH,
Att'ys for Def't & App'l't.

118 In the supreme court of the State of California. April term, A. D. 1875.

On appeal from the district court of the 11h judicial district, in and for the county of El Dorado

BENJ. W. BUGBEY, RESPONDENT,
vs.
NATOMA WATER AND MINING COMPANY, appellant. } No. 3857.

And now at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court from the bench.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order of the district court of the 11h judicial district, in and for the county of El Dorado, in the above-entitled cause, be, and the same is hereby, affirmed with costs.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause, on the 30th day of April, A. D. 1875, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 3d day of September, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

(Indorsed:) No. 3857. In the supreme court, State of California. Remittitur. Benj. N. Bugbey vs. Natoma Water & Mining Co. Clerk's cost, $15. Paid by appellant, $15. Paid by respond't, $. Total, $15. Grant I. Taggart, clerk. By Allen Tillinghast, deputy.

119 UNITED STATES OF AMERICA, *ss:*

To B. N. Bugbey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washinton, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein the Natoma Water and Mining Company is plaintiff in error, *plaintiff*, and you are defendant

in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable William T. Wallace, chief-justice of the supreme court of the State of California, this tenth day of May, A. D. 1875, and of the Independence of the United States the ninety-ninth.

W'M T. WALLACE,
Chief-Justice.

120 STATE OF CALIFORNIA,
County of Sacramento, ss:

On this third (3rd) day of September, in the year of our Lord one thousand eight hundred and seventy-five, personally appeared before me, the subscriber, Charles G. W. French, and the said Charles G. W. French having been by me first duly sworn, says and deposes that he is of lawful age, and the attorney of record of the Natoma Water and Mining Company in this cause, and that he personally delivered a true copy of the within citation to B. N. Bugbey, the defendant in error therein named, on the fourteenth (14th) day of July, A. D. 1875; and that he personally delivered, also, a true copy of the within citation to George E. Williams, the attorney of record in said cause, on the eleventh (11th) day of August, A. D. 1875; and that he exhibited this original citation to the said B. N. Bugbey and to the said George E. Williams at the time he served and delivered the copies aforementioned.

CHARLES G. W. FRENCH.

Sworn & subscribed to before me this 3rd day of September, A. D. 1875.

GRANT I. TAGGART.
Clerk of Supreme Court, State of California,
By ALLEN TILLINGHAST, *Deputy.*

(Indorsed:) 3857. United States Supreme Court. Natoma Water and Mining Company, pl'ff in error, vs. B. N. Bugbey, def't in error. Citation. Filed September 3rd, 1875. Grant I. Taggart, clerk of the supreme court of the State of California, by Allen Tillinghast, deputy clerk.

121 UNITED STATES OF AMERICA:

Supreme Court of the United States.

NATOMA WATER AND MINING COMPANY,
plaintiff in error,
vs.
B. N. BUGBEY, DEFENDANT IN ERROR.

Know all men by these presents, that we, Henry C. Kirk, Henry Miller, and Levi Crosby Chandler, all of the city of Sacramento, State of California, are held and firmly bound unto Benjamin N. Bugbey, of Folsom, county of Sacramento, State of California, in the sum of two thousand ($2,000.00) dollars, to be paid to the said Benjamin N. Bugbey, his executors or administrators: To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this tenth day of May, A. D. 1875.

122 Whereas the above-named Natoma Water and Mining Com-

pany hath presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such, that if the above-named Natoma Water and Mining Company shall prosecute its said writ of error to effect, and *and* answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY C. KIRK. [SEAL.]
HENRY MILLER. [SEAL.]
LEVI CROSBY CHANDLER. [SEAL.]

In presence of—
ED. M. MARTIN.

Approved by me this tenth day of May, 1875.
W'M T. WALLACE,
Chief-Justice of the Supreme Court of California.

123 UNITED STATES OF AMERICA:

STATE OF CALIFORNIA,
County of Sacramento, ss:

Henry C. Kirk, Henry Miller, and Levi Crosby Chandler, the persons named in and who subscribed to the foregoing undertaking as sureties thereto, being severally duly sworn, say, and each for himself deposes and says, that he is worth double the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a freeholder in the county of Sacramento, State of California.

HENRY C. KIRK.
HENRY MILLER.
LEVI CROSBY CHANDLER.

Subscribed and sworn to before me this 10th day of May, A. D. 1875.
ED. M. MARTIN,
Notary Public.

{ NOTARY PUBLIC, SACRAMENTO COUNTY. }

(Indorsed:) 3857. United States Supreme Court. Natoma Water & Mining Co., plaintiff in error, vs. B. N. Bugbey, def't in error. Supersedeas bond. Filed May 10th, 1875. Grant I. Taggart, clerk supreme court, State of California, by Allen Tillinghast, deputy.

124 In the supreme court of the State of California.

B. N. BUGBEY, PLAINTIFF AND RESPONDENT,
vs.
THE NATOMA WATER AND MINING COMPANY,
defendant and appellant.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the within and foregoing are—

1st. A full, true, and correct copy of the petition for writ of error on file in my office.

2nd. The original writ of error.

3d. The return to writ of error, consisting of a full, true, and correct

copy of the transcript on appeal and of the judgment entered, as shown by the records of my office.

4th. The original citation.

5th. A full, true, and correct copy of the bond.

And I d' further certify that the plaintiff in error, within ten days after the rendition of the judgment, lodged for the def't in error a certified copy of the writ of error.

In witness whereof I have hereunto set my hand and the seal of said supreme court this 3rd day of September, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

(Indorsement on cover:) No. 132. The Natoma Water and Mining Company, plaintiff in error, vs. B. N. Bugbey. California sup. court. Filed 24th September, 1875.

Supreme Court United States.

No. 132.

THE NATOMA WATER and MINING COMPANY,

Plaintiff in Error,

vs.

B. N. BUGBY,

Defendant in Error.

In Error to the Supreme Court of California.

SHELLABARGER & WILSON,

For Plaintiff in Error.

Thomas McGill & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

No. 132.

THE NATOMA WATER AND MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

B. N. BUGBY, DEFENDANT IN ERROR.

Error to the Supreme Court of California.

STATEMENT OF THE CASE.

1. Action below was begun on 16th April, 1868, in the District Court of the eleventh district of California, against the plaintiff in error, a corporation organized and acting under the laws of California, for the recovery of possession of, and damages for the withholding possession of, a strip of land, ten feet wide, extending across south half of section sixteen and the northeast quarter of the northwest quarter of section twenty-one, all in township ten, north of range eight east, of the Mount Diablo base and meridian, which land, the complaint alleges, plaintiff owned in fee, and was entitled to the possession of, from the 17th October, 1866. (R., 4.)

2. On 29th May, 1872, a demurrer, which had, on the 22d October, 1869, been filed to said complaint, was confessed,

and plaintiff had leave to file amended complaint, which was filed on 14th June, 1872, and which differs from the first complaint, mainly in that it makes more definite the description of the strip of land sued for; but the quarter sections, &c., were the same. (R., 5 and 6.)

3. After a demurrer to this amended complaint had been overruled, the defendant answered on the 8th of April, 1873.

This answer extends from page 7 to 10, inclusive, of printed record. It denied every material averment of the complaint, and then proceeded to set up several distinct and independent defenses. These defenses, so far as they set up and rely upon rights, titles, and privileges claimed by the defendant under the authority and the statutes of the United States, and which claim was, by the court, decided against, will be found, in their substance, to amount to this:

That the Natoma Water and Mining Company was a corportion organized under the laws of California; that in 1851 and 1852, the lands sued for were public lands of the United State, were wholly unoccupied and unsurveyed, and the defendants then entered upon, surveyed the line of the canal mentioned in the complaint, describing it, and constructed their canal thereon, and then and there, and for the purposes aforesaid, took possession of all the lands sued for, and have ever since possessed, occupied, and used the same, openly, notoriously, and adversely, as against the United States, the State of California, the plaintiff, and all other persons; that this possession, use, and occupancy was taken and held under a grant of the United States, and for the purpose, by means of the canal, of supplying water to miners and for other purposes; that the original grant from the United States was so much land "under and on each side of the said canal as was necessary for the proper use, operation, and management of the same;" that the United States, while said lands belonged to the Government, granted, acknowledged, and affirmed to the defendant the perpetual right of way for said canal and its banks for the convenient use, operation, and control of the same, and the perpetual right to use, possess, and enjoy

the said canal thereon; that the said land is mineral land; that said grant of said land by the United States has never been revoked, but has since been expressly affirmed by the public act of July 26, 1866; that many years subsequent to defendant's entry and occupancy on section 16, mentioned in the complaint, and before the survey of said section, and prior to March, 1854, settlements were made and dwelling-houses erected on said section, and portions of the same were cultivated and pre-emption rights claimed; but defendant's rights were always recognized and acknowledged by all such settlers and by plaintiff, and that all the facts in this answer heretofore set forth were well known to plaintiff; that the proceeding by which plaintiff obtained from the United States, through the State of California, the patent for the land in section 16 was fraudulent, in being secret, in denying the existence of "improvements" other than those of the plaintiff, in ignoring and denying the said improvements made by the defendant, in giving the defendant no notice, &c.

FACTS FOUND BY THE COURT.

The judgment in the case was rendered on the 4th of April, 1873; the amended judgment was entered on the 8th of April, 1873. It was submitted to the court, with a stipulation, made in open court by the respective parties, through their said attorneys, duly entered in the minutes of the said case, that the court might make and file its findings, decisions, and judgments at any time before the 10th of April, 1873. (See Record, pp. 18 and 19.)

The findings of fact entered of record and found by the court, so far as they affect the Federal question in the case, will be found to be, in substance, as follows, (Record, pp. 11 to 17, inclusive:) That in 1851, the line of canal named in the pleadings was surveyed and located on the lands sued for; that during 1851 and 1852, said canal was being excavated by defendant; that it was completed about the first of April, 1853, and has ever since been continuously used and possessed by defendant for running water therein; that the land over and through which said canal was constructed was

vacant, unclaimed public land of the United States Government; that said canal was constructed on said lands, in accordance with the customs, laws, and decisions of the courts of the State of California, for the purpose of conveying water through mineral lands in some places and agricultural lands in others, and for the purpose of securing the right to convey the said waters across the premises sued for, for the purposes aforesaid; and that defendant did acquire the right to the use of said waters and said canal for conveying the said waters for the purposes aforesaid; that the said canal cost about four hundred thousand dollars; that defendant's right to use the waters and the line of the canal thus constructed was never disputed until the commencement of this action; that for more than fifteen years before this suit was brought, defendant was in the continuous, uninterrupted, absolute, peaceable, and exclusive possession of all the lands sued for, claiming title adverse to plaintiff and all others, exercising dominion over and running water through all of the said land; but such possession was not, in fact, adverse to plaintiff and his grantors, except since the 19th of May, 1866. And the plaintiff's immediate grantor, the State of California, never did, nor did the plaintiff, since the 22d of April, 1867, acquiesce in the defendant's claim to the use of the lands sued for.

That uniformly, since the defendant has had and used the said land and canal, as aforesaid, such occupation, use, &c., has been acknowledged and recognized by the local customs, laws, and decisions of the courts of this State and the United States, except as to titles obtained from the United States prior to the 26th of July, 1866; that said land sued for is indispensable for the uses of said canal, which would be almost valueless, without the use of the said land; *that in July*, 1853, *a settlement was made on the southwest quarter of said section* 16, *a dwelling-house was erected thereon, and a small piece of ground cultivated; that one Jenkins, in July or August*, 1853, *settled on the northwest quarter of section* 16, *erected a dwelling-house thereon, and cultivated a small piece of land as a garden; that Hardesty, Hamilton, and Jenkins were the first set-*

tlers on the line of the canal, and two of them used water for irrigation from this canal in 1853; that there is no other route than through the lands in controversy by which water can be brought to supply the mines, farms, and vineyards, which the canal is found by the court to supply; that plaintiff, up to application for his patent, and within two years past, recognized and acknowledged defendant's right to, and ownership and possession of, said canal and lands in controversy; that, except as against a title derived from the United States prior to 26th July, 1866, defendant owned said right to said canal and to said use of same; that at the *time* said section *sixteen* was *certified over to the State of California* by the officers of the United States, *the plaintiff was an actual settler*, with dwelling-house and improvements thereon, and had been *since about* 1861, *when he succeeded Hardesty; that the Jenkins place, on the northwest quarter same section sixteen, settled on by him in July or August*, 1853, *was, from the last-named date to the present time, occupied in like manner, first by Jenkins, then by a Dutchman, whose name did not transpire on the trial, and lastly, and still, by one Stroup; (the period of their several occupancies not being shown on the trial;) that the Hardesty place and the Jenkins place have been continuously cultivated, by those living on them, since July or August*, 1853, *down to the present time;* that said canal is a public work, but its use was not granted by the United States or California; that the lands in dispute are not mineral; that about the month of July, 1853, Hardesty settled upon the southwest quarter of section sixteen; cultivated two acres; erected a dwelling-house thereon, and left in 1858, and was succeeded by the plaintiff about 1861; *that prior to 19th of May*, 1866, *this township ten was surveyed and sectionized by the United States, and the survey approved by the United States surveyor general for California, on the* 19*th of May*, 1866, *and the township plat of such survey was filed as approved by the United States, in the office of the surveyor general of California, on the* 16*th of June*, 1866; that on the 28*th of September*, 1866, *the United States register of the land office at Marysville, certified to the State land office that there were no claims filed on said section sixteen, except pre-emption No.* 3650, *of John Hancock, for the west* half

of the northwest quarter of said section sixteen, which was subsequently abandoned; that on 22d April, 1867, the State of California, pursuant to act of 3d March, 1853, for survey, &c., of lands in California, and in pursuance of State laws, granted to the plaintiff the lands on which the tract in dispute extended; that plaintiff and his witnesses in the application for said lands, and in their affidavits, *stated that said lands were unoccupied, and that there were no improvements other than the plaintiff's on said land, and that, to the best of their knowledge, there was no valid claim existing to said land adverse to said plaintiff.*

PROPOSITIONS OF LAW FOUND BY THE COURT.

1. That by said act of 3d March, 1853, (10 Stats., 244,) the title to the land sued for as to designation and quantity passed to California.

2. That on the completion of said surveys and their approval 19th May, 1866, said title vested absolutely in California, not only as to designation and quantity, but as to place and position also.

3. That after said 19th May, 1866, Congress could not impair or limit said title in California in the lands in suit.

4 and 5. That defendant could not hold adversely to United States, to the State, or to plaintiff, as averred.

6. That at the date of the act of 26th July, 1866, (14 Stats., 251,) the General Government had no title to the lands sued for in said section 16, and hence could confer as to them no privileges on defendant.

7. That the title to the land in suit in said section 16 was, from 19th May, 1866, until 22d April, 1867, in California; and, since defendant has not connected himself with that true title, he cannot attack said patent to plaintiff from the State.

8. That plaintiff owned, and from 22d April, 1867, had owned, the lands in suit in section 16, and was entitled to possession thereof, and was entitled to recover possession of said lands sued for in section 16, and $59 for rents and profits thereof.

The court found against plaintiff as to land in section 21, and ordered judgment according to the facts and law found.

Judgment was rendered as above stated. (R., pp. 18, 19, 20.)

Exceptions were filed by defendant to the above-named findings of fact and law. (R., 20 and 21.)

A bill of exceptions, from page 21 to page 45 inclusive, sets forth all the evidence, exhibits, and all other matters requisite to present to the Supreme Court the questions of error assigned and made by defendant in regard to the above-named findings of fact and of law and said judgment for plaintiff; and of error in overruling the motion for a new trial, as set out at pages 44 to 47 Record, and this bill of exceptions was duly settled and certified 17th May, 1873. (R., 45.)

Appeal to the Supreme Court of the State was duly taken. (R., pp. 47 and 48.) On 30th April, 1875, this judgment of the District Court was by the Supreme Court of the State affirmed on appeal. (R., 49.)

(The case is duly brought by petition for writ of error, (R., 1,) by citation (R., 49 and 50) and writ of error (Rec., pp. 2 and 3) into this court.

Assignment of Errors.

The Supreme Court of California erred in rendering the judgment for the respondent, Benjamin N. Bugby, by affirming the judgment of the District Court of the eleventh judicial district of California, as such judgment of affirmance is set out in the printed record in this case, at page 49. Said errors, so necessarily involved in reaching and rendering such judgment by the Supreme Court of California, are more specifically assigned, as follows:

1. That although the record so presented to the Supreme Court showed that parts of section sixteen, township ten, range 8 east, named in the pleadings, had been settled upon by the

erection of dwelling-houses, cultivation, occupation, and improvement, from the date A. D. 1861, and was so settled upon, occupied, and improved, from that time continuously down to the time of the said judgment in the District Court, as was expressly found as a fact by the court, and entered in the record of its judgment, (R., pp. 13, 14, &c;) and although such settlement, improvements, and occupancy of said section sixteen were made and existed long before said township and said section were surveyed, and existed and continued at the date of and ever after said survey, as was expressly found in said judgment by the court, and as appeared in said record, (R., pp. 15 and 16,) yet the court erroneously found, held, and adjudged, that, in virtue of said act of Congress of 3d March, 1853, (10 Stats., 246, 247,) the title to the lands in the said section sixteen, sued for, passed to the State of California, as to designation and quantity; and passed absolutely upon the approval by the United States authorities, of the survey of said township ten, upon the 19th of May, 1866. (R., p. 17.)

2. That although the facts were, by the court, found as aforesaid, and as appears in printed record, pages 13 and 14; and although the court further found this plaintiff's right to use the land sued for in this case was as set forth on pages 12 and 13 of the record, yet the court erroneously held, that the said right, title, and interest of this plaintiff, in said lands sued for, could not be, and were not, confirmed unto this plaintiff, as to said land in said section sixteen, by said act of Congress of the 26th of July, 1866. (14 Stats., 353.) And the court erroneously held that Congress had no power to confirm to this plaintiff his said title, use, and interest in said lands in said section sixteen. (R., p. 17.)

3. That the court erred in holding that the date of the passage of the said last-named act of 26th of July, 1866, the General Government had no title to the lands sued for in section sixteen, and consequently could confer no rights nor

privileges upon this plaintiff in error, with reference to said lands. (R., pp. 17 and 18.)

4. That the court erroneously held that the true title to said land sued for was, from the 19th of May, 1866, until the 22d of April, 1867, in the State of California and after the last-named date was in the said plaintiff, Bugby, and that he was entitled to recover, as was adjudged said case. (R., p. 18.)

5. That the said Supreme Court erred, in that the facts appearing in said record show that the judgment of the Supreme Court should have been one reversing said judgment of the said District Court.

6. Other errors appearing in said record.

BRIEF.

The judgment of the Supreme Court in California, which the writ of error brings into this court for review, was rendered upon the 30th of May, 1875. It was therefore decided before the case of Sherman *v.* Buick, 3 Otto, 209, which this court decided at the October term, 1876. We apprehend that this case is determined by the case of Sherman *v.* Buick.

The court will please observe the following facts which appear in the judgment of the court below.

(1.) The lands recovered in this case, upon their survey, fell in section sixteen, made a school section by the 6th section of the act of 1853. (10 Stats., 246.)

(2.) That these lands were not surveyed until 1866, and the survey was approved the 19th of May in that year, and the township plat of said township 10, was filed with the United States surveyor general, 16th June, 1866. (R. 15.)

(3) That we took possession, in 1851, of the lands in section 16, which are sued for; that, in 1851 and 1852, our canal was constructed, and completed April 1, 1853, which

occupies the lands in section 16, sued for; (R., 12;) and that, ever since, we have continuously, uninterruptedly, peaceably, and exclusively held, used, and occupied said land, claiming title thereto adverse to the plaintiff and all other persons, and, during all this time, we have been running water through the said canal, and exercising dominion and control over the whole thereof, for the purposes of supplying mines, farms, and vineyards with water, and that this location, construction, and use of said canal and land was made and continued in conformity to, and was recognized, acknowledged, and approved by the local customs, laws, and decisions of the courts of the State of California and the United States, (except, as it is claimed in the present case, to be violative of the rights of California and its assignees, under the said act of 3d March, 1853,) and that our rights were fully recognized by the plaintiff below until he brought this suit.

It will therefore be seen, that the property claimed by the defendant below comes exactly within the description of the property confirmed to the defendant by the 9th and other sections of the act approved July 26, 1866. (14 Stats., 251.)

If, therefore, we did not acquire absolute ownership of the rights set up in our answer, in virtue of the said last-named act, then the failure to acquire was owing to the fact that the United States then held no right in said section 16 whereby Congress could confirm to us our said alleged rights.

(4) But not only were we in possession of and had improved part of said section 16, but in addition to that the court below expressly found, as a part of its judgment in the case, the following facts in regard to other settlements and improvements upon said section 16: "That about the month of July, 1853, one ——— settled on the southwest quarter of section 16, erected a dwelling-house, and cultivated a small piece of ground; that one Jenkins, in July or August of the same year, settled upon the northwest quarter of section 16, erected a dwelling house, and cultivated a small piece of land as a garden; that Hardesty, Hamilton, and

Jenkins were the first settlers along the line of this canal, and that two of them used water from the canal for irrigating purposes in the year 1853." (R., 13.) "That at the time said section 16 was certified over by officers of the United States Government to the State of California, which was on the 28th day of September, 1866, (after we received our title under the said act of July 26, 1866,) the plaintiff was an actual settler thereon, with dwelling-house and agricultural and other improvements thereon, and had been since about the year 1861, when he succeeded Hardesty; that the Jenkins place, on the northwest quarter of the same section, settled on by him in July or August, 1853, was, from said last-mentioned date to the present time, occupied in like manner —first by Jenkins, then by a Dutchman whose name did not transpire on the trial of this action, and lastly and still by one Stroup, (the period of their several occupancies not being shown on said trial;) that the Hardesty place and the Jenkins place have been continuously cultivated by those living upon them since July or August, 1853, down to the present time."

(If it were material so to do, by contrasting the facts just stated, with the oaths of the defendant and his witness as found by the court in the fortieth finding, on page 16 of the record, it will be seen that the averment of the answer, found on page 9 of the record, that the plaintiff obtained his patent by fraud, is fully sustained.)

The facts now stated from the record, and which entered into the judgment of the District Court and constituted the foundation thereof, establishing the occupation of the said section 16, by settlement with dwelling-houses and cultivation, bring this section 16 exactly within the following language of section 7 of the act of 3d March, 1853, to wit: "That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, * * * other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to provisions of the acts of Congress approved 20th of May, 1826," &c.

This section 16, therefore, comes precisely within the decision of Sherman *v.* Buick, where the court uses this language:

"Actual settlement before survey made accompanied the grant," (made by the United States to California by the act of 3d March, 1853,) "as a qualifying limitation of the right of the State, which she was bound to recognize when it was found to exist, and for which she was authorized to seek indemnity in another quarter."

The opinion in this case renders it unnecessary for us here to discuss either the question when the grant made by the sixth section of said act of 3d of March, 1853, takes effect, whether *in præsenti* or only after approval of survey and plat filed, or the question of the effect of the finding by the United States land officers, as set forth in the 37th finding, page 16 of printed record, that no claims were filed on section 16, except Hancock's.

Just as the court (page 215) say it was not necessary in this case to find when the title vests in the State, so it is not necessary, and for the same reason, in the case at bar. So, also, in the present case it is not necessary to examine the questions of alleged fraud in procuring the plaintiff's patent from California, because of the want of power existing in this case, as in the Sherman case, to issue any patent for any part of said section 16, either to the State of California or by the State to the said plaintiff below.

These lands were, by the judgment of the court, conclusively found to have been, long before their survey, and at latest ever since 1853, occupied by settlement, by erection of dwelling-houses, and by cultivation; and that occupation, settlement, and cultivation, by their own vigor and operation, become a "qualifying limitation of the right of the State, which she was bound to recognize when it was found to exist." The existence of the fact becomes a negative upon and a vacation of all power in the State to take, and upon all United States officers to make any grant to California of any part of said section 16 so occupied by settlement before servey.

It is wholly immaterial, therefore, what United States officials found or did touching the occupation of this section 16, or touching making grant thereof to the State.

Upon this point, this court say, in speaking of evidence directed to show the title of the State void, that "its object was to show that the State of California, when she made her conveyance of the land to defendant, had no title to it; that she never had; and that by the terms of the act of Congress, under which she claimed, the only right she ever had in regard to this tract, was to seek other land in lieu of it. The effect of the evidence was to show that the title set up by defendant under the State was void; not merely voidable, but void *ab initio*. For this purpose, it was competent, and it was sufficient; for it showed that, when the survey was actually made, and the land in question was found to be part of section 36, plaintiff had made a settlement on it, within the meaning of the seventh section of the act of 1853, and the State could do nothing but seek indemnity in other lands."

"It has always been held, that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though, where it is merely voidable, the party may be compelled to resort to a court of equity to have it so declared."

The argument of this case, since the decision in Sherman *v.* Buick, must be found in getting before the court conveniently the facts in the case. Hence, we have endeavored to above set out such facts as pertain to the federal question in the record. These being brought to the attention of the court, any argument beyond the case of Sherman *v.* Buick, seems inappropriate, because of the conclusiveness of such case upon the present one.

SHELLABARGER & WILSON,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 132.

THE NATOMA WATER AND MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

B. N. BUGBY, DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF FOR DEFENDANT IN ERROR.

A. A. SARGENT,
Counsel for Defendant in Error.

Judd & Detweiler, Printers

Supreme Court of the United States.

No. 132.

THE NATOMA WATER AND MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

B. N. BUGBY, DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error brought his action in the district court of the 11th judicial district of the State of California, against the plaintiff in error, which is a corporation under the laws of California. The action was ejectment. The complainant averred that the defendant in error was seized in fee and entitled to the possession of the following described real estate: Situated in El Dorado county, California, known and described as 'the south half of section number sixteen, and the north-east quarter of the north-west quarter of section number twenty-one, all in township number ten north, of range number eight, east of Mt. Diablo base and meridian. The complaint further averred that the plaintiff in error has unlawfully entered on and taken possession of a portion of the said premises, which said portion is particularly described, being a tract ten feet in width and about eighty-four chains in length, which includes the

bed and banks of the Natoma Water and Mining Company's canal, and had ousted the defendant in error therefrom, &c. (Page 5 and 6 printed Record.)

THE DEFENCE.

The answer set up the defence that in the years 1851 and 1852, while the lands described in the complaint were public lands of the United States, the plaintiff in error "under grant of the United States," entered upon the said land, surveyed and located the lines of the canal mentioned in the complaint, and excavated and constructed said canal on the tract of land described in the complaint as ten feet in width and about eighty-four chains in length, including the beds and banks of the canal, being the land claimed by defendant in error from plaintiff in error in the action; and then and there under said grant took possession of said tract, and had ever since, continuously, without interruption, held and maintained actual and exclusive occupation and possession of said tract of land adversely to the defendant in error, and all other persons and parties claiming the same, as the owner thereof during all the time since the location of the line of the canal thereon.

The answer further avers that the canal is a part or section of the Natoma Water and Mining Company's mining canal or ditch which was located and constructed in the years 1851 and 1852 by the company, for the purpose of supplying water to the miners for mining, and to others for other purposes. That ever since the construction of said canal it has been continuously used for the purpose aforesaid for conveying water from the American river, which the company has sold for the uses before mentioned.

The answer further avers that while the lands described in the complaint were public lands of the United States and subject to the act of the Government of the said United States, plaintiff in error received from the Government of the United States, a grant to enter upon, and locate,

and construct said canal, and to use, occupy and possess the same, and so much of the land under and on each side of the same as was necessary for the proper use, operation and management of the canal; and that all of the tract described in the complaint as covered by the bed and banks of the canal, is necessary and indispensable for the use of the canal; and that said grant has never been revoked or annulled, but has since been expressly acknowledged and confirmed by the public act of said government, approved July 26th, 1866.

The answer further avers that, while the lands described in the complaint were public lands of the United States, the Government of the United States, granted, acknowledged, and confirmed to plaintiff in error a perpetual right of way for said canal and its banks, and sufficient lands on either side of its banks, for the convenient use, operation, and control of the same, and the perpetual right to use, possess, and enjoy said canal thereon, and that said affirmation was made by the act of Congress of the United States, which was a public act.

The answer further sets up the Statute of Limitations; avers that the tract of land sued for in this action, and covered by the canal of plaintiff in error, is mineral land, containing mines of gold, and is located in the mineral and mining localities of the State; and that so far as the defendant in error claims the lands sued for, which are located within section sixteen, from the State of California, and proceedings by the officers of said State, or of any county thereof, the same is void for fraud as against the rights of plaintiffs in error in the said premises. That said proceedings were conducted secretly and in fraud and intended to cloud and impair the rights of plaintiff in error. (Pages 7, 8, and 9 of the Record.)

The Findings of Fact.

The court in which the action was tried, among others, made the following findings of fact:

That the right of plaintiff in error to the use of the land sued for in the action for the purpose of furnishing water for mining, agricultural, and other purposes, during all the time since the construction of said canal, in 1851, has been uniformly acknowledged and recognized by the local customs, laws, and decisions of the courts of California and the United States, except as against the title to said land, derived from the Government of the United States prior to the 26th day of July, 1866, and that the said land is necessary and indispensable for the uses of said canal, which would be almost valueless without the use of said land.

That the plaintiff in error acquired, by the construction and use of said canal, a vested right to possess and use the same for the purpose of furnishing water for the purposes aforesaid, except as against the title to the lands over which said canal passes, derived from the Government of the United States prior to the 26th day of July, 1866, which right, except as against said title, has continued ever since.

That at the time the said section sixteen was certified by the officers of the United States Government to the State of California, to wit, on the 28th of September, 1866, defendant in error was an actual settler thereon, with a dwelling house and agricultural and other improvements thereon, and has been since the year 1861, when he succeeded one Hardesty.

That notice, as required by the fifth section of the act of April 27th, 1863, entitled "An act to provide for the sale of certain lands belonging to the State," was given to the plaintiff in error.

[Section five referred to in this finding, is as follows: "Section 5. Whenever a settlement is or has been made "by occupation or improvement upon any portion of a six- "teenth or thirty-sixth section of any of the public lands in "this State, the locating agent of the district in which such "land is situated, shall, if such occupant has not acquired a "pre-emption right to such land, notify such occupant or

"claimant of the fact that he is upon lands belonging to "the State, and that he must make application to purchase "the same of the State within sixty days, or forfeit all "rights to the land. If such occupant or claimant shall "neglect or refuse to make such application to purchase "within the sixty days above named, such land shall be "subject to location and sale, in the manner provided for "the sale of other sixteenth and thirty-sixth sections, with "the exception that the affidavits in regard to occupancy, "and improvement may be omitted, in all of which cases "the application to purchase shall be accompanied by the "affidavit of the locating agent of the district, that he has "duly notified the occupant or claimant of the land as pro-"vided by this section, and that for a period of sixty days "after such notice the occupant or claimant has refused or "neglected to apply for said lands."—Statutes of California, 1863, page 593.]

That the application of defendant in error to purchase said lands, mentioned in his complaint, from the State, was made under said act after the survey of said lands by the United States Government.

That the right to use and enjoy the lands sued for in this action, in section sixteen, was not acquired by plaintiff in error by grant from the United States Government or from the State of California.

That the defendant in error and his grantors have been seized of the premises sued for in this action, in section sixteen aforesaid, within two years next preceding the commencement of this action, but have exercised no control or domain over it except by purchase and conveyance of the same.

That the plaintiff in error is, and was at the commencement of this action, in possession of all the lands and premises sued for in this action.

That the south half of section sixteen, and the north-east quarter of the north-west quarter in section twenty-one, are agricultural and not mineral lands.

After finding that the survey and sectionizing of these

lands by the United States Government was prior to the 19th of May, 1866, and that the survey was approved by the United States Surveyor General for the State of California, on the 19th of May, 1866; that the plat was filed in the United States Land Office on the 16th of June, 1866, and the certifying of the same to the State by the United States authorities, as provided by the legislation of Congress, making the title complete in the State of California, the Court further finds that on the 22d day of April, 1867, and before the commencement of the action, the State of California, under the provisions of the act of Congress of the United States, entitled "An act to provide for the survey "of the public lands of California, and the granting of "pre-emption rights therein and for other purposes," approved March 3d, 1853, and in accordance with the various acts of the Legislature of said State preceding the said 22d day of April, 1867, did by letters patent grant to the defendant in error the tract of land located and described, as follows: The S. E. ¼ and the E. ½ of S. W. ¼, and the N. W. ¼ of S. W. ¼ all of section 16, township 10 north, range 8 east, Mt. Diablo base and meridian, together with all the privileges and appurtenances thereunto belonging and appertaining, and that said defendant in error has never since been divested of the same or of any portion thereof.

After reciting the condition of the title to the lands in section twenty-one, the Court held that the defendant in error had no such interest in the lands in section twenty-one at the commencement of the suit, as to enable him to maintain the action in relation thereto. Judgment was entered in behalf of the defendant in error, for the possession of a tract of land, ten feet in width and about eighty chains in length, including the bed and banks of the canal, all being in section sixteen, as also nominal damages for rents and profits.

Grounds for Writ of Error.

From this judgment plaintiff in error appealed to the Supreme Court of the State of California, which court affirmed the judgment of the court below from the bench, and the proceedings are brought into this Court by writ of error, the plaintiff in error alleging in his petition for the writ that he claims right, title, and privilege to the demanded premises, under the statutes of the United States: that is to say, under the act of Congress, approved July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes." And under the act of Congress, approved March 3d, 1853, entitled "An act to provide for the survey of the public lands of California, the granting pre-emption rights therein, and for other purposes."

Argument.

It will be seen from the foregoing recital that the plaintiff in error in 1851 and 1852, went upon the then public lands of the United States, including the demanded premises, and constructed a canal, diverted water from the American river, and conveyed it some miles, for the purpose of the gain to be derived from the sale of the water to miners and agriculturists, and has continued and maintained its canal on these lands until the commencement of this action, and claims the right still to do so, and by virtue of such acts claims to defeat the patent of the defendant in error, who holds under the United States and its grantee the State of California.

There is no claim in this action that it had any right in the premises unless that right arose under the act of Congress of March 3d, 1853, or the act of July 26, 1866, or by virtue of the statute of limitations of the State. The "grant" set up in the answer has this extent, no more.

The Act of 1853.

A glance at the act of 1853, page 244, vol. 10, United States Statutes at Large, will show the Court that no provision is made therein for the construction or maintenance of such ditches or granting to those constructing them any right of way, easement on, or right of possession of the land or ownership thereof. On the contrary, by the sixth section of that act, sections sixteen and thirty-six in each township were granted to the State of California for the purposes of public schools. The portion of section sixth of the act, which is all of the act material to this case, is as follows:

And be it further enacted, "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one," &c.

Vol. 10 Stat. at Large, 246.

By virtue of this act, the title of the United States to the lands sued for by the defendant in error in section sixteen, township ten north, range eight east, Mt. Diable meridian, passed to the State of California, as to designation and quantity; and when said lands were surveyed and sectionized by the United States Government, and said survey was approved by the United States Surveyor General for the State of California, which was done on the 19th day of May, 1866, the title to said land vested in the State of California absolutely, not only as to designation and quantity but as to place and position also.

"By the act of Congress granting to California the sixteenth and thirty-sixth sections in each township, the State

became the owner of said sections, with the right reserved in the General Government of locating the same; and as fast as townships are surveyed and sectionized the State becomes the owner of said section absolutely, not only as to quantity but as to position also."

Higgings *vs.* Houghton, 25 Cal. 252.

THE ACT OF 1856.

Congress had no power, and did not seek to exercise it, after the 19th of May, 1866, when these proceedings took place, and the title of the State of California became absolute in all respects, to limit or impair the title of the State or its grantee to the lands in section sixteen, sued for in this action. Up to July 26th, 1866, the General Government had not in any way recognized the right of parties to go upon public lands and construct canals like that of the plaintiff in error.

On that day an act was passed, of which the ninth section reads as follows:

SEC. 9. "*And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

United States Statutes at Large, vol. 14, p. 253.

At the date of the passage of this act the General Government had no title to the lands sued for in said section

sixteen, and consequently could confer no rights or privileges upon the defendant with reference to said lands. The Government had absolutely vested in the State, more than two months before, the land in controversy. This act of July 26th, 1866, was prospective in its operation, and cannot be construed so as to divest a part of the estate granted before its passage.

Union Co. *vs.* Ferris, 2 Sawyer, 185.
Blanchard *vs.* Sprague, 3 Sum., 535.
Vansickle *vs.* Haines, 7 Nevada, 249.

These considerations effectually dispose of any claim of plaintiff in error to be the possessor of a grant to the demanded premises. No such grant exists by virtue of either statute cited.

The Statute of Limitations.

As to the Statute of Limitations, it is clear by all the authorities that the defendant could not hold adversely to the United States while the title to the lands in controversy was still in the General Government. The Government of the United States has a perfect title to the public land and an absolute unqualified right of disposal. Neither State nor territorial legislation can, in any manner, modify or affect the right which the Government has to a primary disposal of it. The appropriation of water flowing through public lands confers no right on the appropriator, and the construction of a ditch confers no right in the lands occupied by it, in the absence of Congressional legislation qualifying the effect of the Government patent; and this is so, although the customs, laws, and decisions of the State wherein the land lies, recognize and enforce rights acquired by prior ap-

propriations in controversies between occupants of the public lands without title from the Government.

Union Co. *vs.* Ferris, 2 Sawyer, 176.
Gibson *vs.* Chouteau, 13 Wal., 93.
Vansickle *vs.* Haines, 7 Nevada, 249.

In Union Co. *vs.* Ferris, the Court hold that "the statutes of limitations do not run against the United States. So long as the title remains in the United States there cannot be laid any foundation for a title by prescription against the grantee of the Government. In order that any use of water or occupancy of land may ripen into a prescriptive title it must continue for the full period required by the Statute of Limitations after the title has passed from the United States." There is no pretence that the Statute of Limitations had run against the defendant in error after he acquired title from the State and before the commencement of this action.

The plaintiff in error obviously could not hold adversely to the State of California, if at all, until the lands were surveyed and sectionized by the Government of the United States, and the title to such lands had vested in the State as to place and position, by means of survey and segregation and conveyance to the State. It could not hold adversely to the defendant in error, the plaintiff in the action, until he had obtained his patent to the land from the State of California.

Every pretence of defendant to a prescriptive right in the demanded premises, arising from mere occupation, against the United States, the State, or the plaintiff, is tersely answered in Gibson *vs.* Chouteau, 13 Wal., 103.

"But neither in a separate suit in a Federal court, nor in an answer to an ejectment in a State court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statutes of limitations

of the State, be held to constitute a sufficient equity in their favor, to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of the Congress, in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises, before the issuance of the patent under State legislation, in whatever form or tribunal such occupation be asserted."

PATENT CANNOT BE COLLATERALLY ATTACKED.

On the trial of the action, plaintiff in error sought to attack the patent of defendant in error collaterally. The patent of defendant in error to the lands in section sixteen is presumptive proof of all facts necessary to authorize its issuance and every legal intendment necessary to its validity is to be presumed in its favor. The plaintiff in error did not connect itself with the true title to the land, which from the 19th day of May, 1866, until the issuance of the patent to the defendant in error on the 22d of April, 1867, was in the State of California, and took no steps to do so, although duly notified by the State locating agent to do so under the legislation of the State. It cannot dispute or attack the patent from the State held by defendant in error in any manner or for any purpose.

"A patent cannot be attacked collaterally even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey. The right of interference rests only in the government. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them."

Moore *vs.* Wilkinson, 13 Cal., 478.
Hagar *vs.* Lucas, 29 Cal., 309.
Stringer *vs.* Young's Lessees, 3 Pet., 320.
Bagnell *vs.* Broderick, 13 Pet., 436.

"Unless a patent is issued without authority, or is prohibited by statute, or is void on its face, its operation against the government and those claiming by title subsequent, cannot be questioned in any collateral suit. For errors, irregularities, or fraud, committed in any of the steps preliminary to its issuance, inquisition can only be had in a proceeding taken directly for that purpose."

Yount *vs.* Howell, 14 Cal., 469.

Jackson *vs.* Lawton, 10 Johns, 25.

"A patent from the State, valid on its face, cannot be collaterally impeached by matters *dehors* the patent, by a party having no title, in an action at law brought to recover the land purporting to be granted by it."

2 Sawyer, (9th circ. 1872,) 645.

It will be perceived that the case of plaintiff in error is entirely barren of merit. We respectfully suggest th at i should be summarily disposed of, as it was by the Supreme Court of California. The plaintiff in error does not colorably justify the positive averments of its answer that it holds by virtue of a "grant from the United States" by its exhibition of two acts of Congress, one having no relation to its claim unless adverse to it and the foundation of the rights of defendant in error, and the other passed after the govern ment had divested itself of the ownership and control of the property in question, so that there was nothing in the premises on which the act could take effect.

We ask the affirmance of the judgment.

A. A. SARGENT,

Counsel for Defendant in Error.

Supreme Court of the United States.

No. 132.

THE NATOMA WATER AND MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

B. N. BUGBY, DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

SUPPLEMENTAL BRIEF.

At the time of filing the original brief of defendant in error, this case seemed likely to be soon called for hearing. At that time plaintiff in error had no brief on file, but has since filed his brief, and, in answer thereto, a few suggestions, by leave of the Court, are hereto made.

Counsel for plaintiff in error rely upon the law as stated in Sherman *vs.* Buick, (3 Otto, 209,) and insist that the law of that case is applicable to the facts in this case. On the contrary, there is no analogy whatever between the two cases. In Sherman *vs.* Buick the plaintiff in error, who prevailed in this Court, held, under a patent of the United States, the demanded premises, which were a part of a "school section," section 36, and offered proof, which was excluded by the court below, to show that he had settled upon the land nearly four years before it was surveyed, and had filed and proved a preëmption claim to it, paid the United States for it, received a patent certificate for it, and

finally a patent. The defendant in error relied upon a patent of the State supposed to rest on the act of March 3, 1853, granting it, with certain limitations, the 16th and 36th sections for school purposes.

The principal point decided in the case was that the act of March 3, 1853, protects the settler in the kind of settlement therein named, if the surveys, when made, ascertain that such settlement is on a school section; and in such case the only right of the State is to select other lands in lieu of the lands so settled on. The settler who establishes his right, and shows, by certain proceedings had before the United States land officers, that he has erected a dwelling house, or cultivated a portion of the land, and is otherwise a legal preëmptor, is entitled under the law to a patent from the United States, which must prevail against any patent of the State. It would seem that no question could be raised as to the soundness of the adjudication of this Court in that case.

But the case at bar is entirely different in all material facts. The plaintiff in error was not a preëmptor under the statute. It was an artificial person, and could not become such. It did not erect a dwelling-house; it did not cultivate any portion of the land; it does not claim by the required legal sub-division. So far as the United States or the State was concerned, it was a trespasser for years on the public domain, digging a trench several miles in length across the public lands, for purposes unknown to the law until after the rights of defendant in error had accrued. It does not come here proffering any patent from the United States. It asserts a grant under two statutes, one of which (as we have shown by our brief heretofore filed herein) has no provision authorizing or excusing such acts of trespass as it has committed, but which is the foundation of the rights of defendant in error; and the other of which was not passed until after the United States had conveyed the lands in controversy to the State. It is a matter of little

consequence in this case whether the grant of the 16th and 36th sections was a grant *in presenti*, or did not take effect until the survey. The act of July 26th, 1866, (14 Stat. at Large, 253) was not passed until after the survey of the township containing these lands, and after the approval of that survey, and after section 16 had been certified to the State.

Hence the plaintiff in error is not in any position to urge, in its own behalf, the distinctions laid down in the Sherman case. It cannot plead one of the rights, as arising out of its own acts or circumstances, that the plaintiff in error in that case brought to the attention of this Court. It holds no such relation to the land, or to the law of March 3, 1853, as did Sherman, and it is in no way connected with the Government title.

It remains to be seen if the acts of other parties, with whom it had no connection, place it in any better position.

By a glance at the answer of plaintiff in error it will be seen that it does not allege, or rely in any manner, upon the settlement or cultivation of the land by the defendant in error or any other parties as defeating the right of defendant in error. Anything of that nature in the findings is extremely vague, was foreign to the issues, and would have been properly stricken from the findings on motion of defendant in error. Any testimony on which such findings could be based was not pertinent to any issue in the case. The vagueness of the findings in these matters, names being left blank, or supplied by a reference to a nationality, as "a Dutchman," the absence of dates of settlement so important if the settlement of other parties should figure in the case, the omission of any finding whether successive temporary occupiers of the land deraigned from prior temporary possessors, or only went on for awhile, and then abandoned, as in one case (Hancock's) appears, all are significant of the little value placed by the *nisi prius* court and the parties upon this part of the case. In the testimony

sent up in the Record there is nothing to justify such findings, and no reference to any of the parties named as having occupied the land at any time, and in Hancock's case the effort of the plaintiff in error was to show that he had a mining claim, and not a preëmption claim. (Folios 101, 106, Record.)

The defendant in error succeeded Hardesty; whether by purchase or after abandonment, by the latter, does not appear. (Folio 29, Record.) Hamilton, another person, seems to have been on another section. (Folio 27.) Remains only the "Jenkins' place," which Jenkins left in 1853; then "a Dutchman" occupies that place, and finally, "one Stroup;" "the period," as says the Court, "of their several occupancies not being shown on said trial." Surely, here is a frail reliance to defeat the United States patent, even if a right existing in others, and not insisted on by the others, could insure to the benefit of plaintiff in error. These chance possessors never filed preëmption claims, never sought a title from the United States or the State. By the law a mode is pointed out to ascertain such rights, if they exist, and to give them effect. By that mode the evidence of settlement is sifted, and unless it is proved to have been continuous, and have other qualities, it does not avail to secure a patent.

It does not appear that these parties were citizens of the United States, or had declared their intention to become such. The best evidence that these parties had no patentable right, is that they never asserted it in any form before the United States Land Office. Such assertion must be made within three months after the filing the plat of survey at the local land office or it is waived, and the United States recognizes the preëmption of others or certifies to the State in school-land sections. The time fully expired, as appears by the certificate of the Marysville land register, and there being no filing, he followed the law and certified the fact and the land to the State. Any inchoate rights of these

parties fell by their own laches, if they ever had such rights. The plaintiff in error would now revive them for its benefit, under a decision dealing with a case wherein the facts showed no such laches, no abandonment, but a vigorous and explicit compliance with the law, ripening into a patent connecting the party with the paramount title.

Certainly, the fact that the defendant in error was in the position required by the State law to purchase the land, viz., had improvements on the land, and thus a preference in purchasing from the State, should not oust him from the rights granted by the State. He did have a dwelling-house and vineyard on the land, the latter shown by the testimony to be very valuable. But where the regular and due administration of the law has been had through the officers designated for that purpose, by means of which he has acquired his title to the land, mere implications should not deprive him of that title at the suit of a stranger to the proceedings and title. Continuous residence and "actual settlement," as well as cultivation, are required to create a preëmption right. It will not be implied, to defeat the patent, that the defendant resided on the land, because he owned a dwelling-house on it, or cultivated it. He may have leased the land to others, which would defeat a preëmption claim, if he had set it up; in other words, would have shown him not to be a preëmptor. He may have had the benefit of a former preëmption filing, and thereby not be a qualified preëmptor, and his only remedy to save his property be to purchase from the State. He certainly did not file any preëmption claim to the land within the time prescribed by law, and thus any inchoate right he may previously had under the laws of the United States had failed, and he was not entitled to preëmpt at the time of his purchase from the State. The fact that he bought of the State, paying $2.50 per acre for the land, when by the preëmption law he could buy of the United States for $1.25, shows that he did not in good faith consider himself entitled as a

preëmptor. So far as the United States was concerned it could make no difference to it pecuniarily whether he bought of it this piece of land or not, as it would have been required to furnish lieu lands for these if sold to defendant in error.

Whether the patent of the State and United States can be collaterally attacked, we have considered in our former brief in this case. We submit that the considerations therein stated apply to the question whether the court will consider if persons not parties to the record, and under whom plaintiff in error does not hold, and who have been entirely silent when a time and mode of speech are prescribed by the law, were improperly overlooked by the United States officers in determining that this land was patentable to the State, when these officers had no means of knowing even of their existence if they were silent.

Respectfully submitted,

A. A. SARGENT.

Of Counsel for Defendant in Error.

Mr Justice Clifford

60 U.S. 165
Oct. T. 1877

No. 132

In the Supreme Court of the United States.

The Natoma Water and Mining Company,
PLAINTIFF IN ERROR,

v.

B. N. BUGBEY,
DEFENDANT IN ERROR.

Error to Supreme Court of California.

PETITION FOR REHEARING.

A. P. CATLIN,
Of Counsel for Plaintiff in Error.

Filed _____ *1878.*

_____ *Clerk.*

H. A. WEAVER'S Law Printing Office, No. 91 J Street, between Third and Fourth, Sacramento

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THE NATOMA AND WATER MINING COMPANY,
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DEFENDANT IN ERROR.

Error to Supreme Court of California.

PETITION FOR REHEARING.

SINCE the decision of this Court in the case of Sherman v. Buic, 3 Otto, 209, which reversed the judgment of the Supreme Court of California, counsel for plaintiff in error submitted this cause, without oral argument, upon a brief which confidently relied upon the doctrine of that decision as warranting a reversal of the judgment in this case. Counsel for defendant in error after-

wards submitted a supplemental brief, to which there was no opportunity for reply. The District Court in California gave plaintiff (defendant in error here) judgment upon the authority of **Sherman v. Buic**, which then had recently been decided by the California Supreme Court. The judgment of the District Court was affirmed by the California Supreme Court, without an opinion, upon the authority of the same decision. Defendant brought the case here by writ of error, before the reversal by this Court of the judgment of the California Supreme Court in **Sherman v. Buic.**

The appellant relied upon two grounds:

First—It expected to overthrow the authority of **Sherman v. Buic**, which had been fatal to its cause in the State Court, and, to maintain the proposition, denied in that case, that the title to the lands in controversy never passed to the State of California.

Second—That, without regard to the first proposition, its right of way over the lands in the school section patented by the State to the defendant in error was licensed by the Government prior to the time that the State title took effect; and that there was a grant by presumption of such right of way, and that such license and presumed grant was of sufficient dignity and

quality to be operated upon and confirmed by the Act of July 26th, 1866.

It did not appear to be necessary to argue the latter proposition, nor, indeed, more than to state the former, in view of the fact that we deemed the case fully within the law of **Sherman v. Buic.**

We ask for a rehearing upon both propositions.

It is a matter of exceeding consequence to plaintiff in error, whose canal is one of the earliest enterprises as well as one of the most important private properties of California. The loss of that section of the canal which runs through this school section destoys the whole property irreparably, as there is no other route. **(Vide 14th Finding.)**

The company being a private corporation, has, probably, no remedy under the power of eminent domain. These grave consequences justify us in asking a thorough and careful consideration of the two propositions above stated and such others as grow out of them.

I.

In **Sherman v. Buic** the party contesting the State title connected himself with the Government title by being a preëmption claimant. In

the case at bar plaintiff in error denies that the State ever had any title to the lands in controversy, and that the State patent to defendant in error is void—not merely voidable, but void *ab initio*. Sherman held a patent under the preemption laws from the United States, and brought ejectment against Buic, who was in possession under a patent issued to him by California. In the case at bar the defendant is in possession and is sought to be ousted in an action of ejectment brought upon a patent issued by the State, and the defense is (in this branch of it) that plaintiff has no title, and that his profered muniment of title from the paramount source is absolutely void and of no effect whatever. The Court says in **Sherman v. Buic**: "It has always been held that an absolute want of power to issue a patent could be shown in a Court of law to defeat a title set up under it, though where it is merely voidable the party may be compelled to resort to a Court of equity to have it so declared."

In ejectment the defendant's possession is presumed to be under title from the paramount source, which presumption must be overthrown by proof of an older possession by plaintiff, which, upon the same principle, is presumed to have been under title from the paramount source, or it must be overcome by the production of the paper title itself, evidenced by competent authority.

As to whether the State patent conveys the title to the lands in controversy depends upon the true intent and meaning of Congress in placing upon the grant of the 16th and 36th Sections, contained in Section 6 of the Act of March 3d, 1853, the limitation contained in the 7th section of the same Act, which is in these words:

"That where any settlement by the erection of a dwelling house, or the cultivation of any portion of the land, shall be made upon the Sixteenth and Thirty-sixth Sections before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the Act of Congress, approved 20th May, 1826," etc.

This Court said in **Newhall v. Sanger**, decided at a recent term, ~~but not yet reported~~, in considering the question whether lands, claimed under a Mexican grant subsequently adjudged to be invalid, passed by the grants to the railroad companies, that "the *status* of lands covered by a Spanish or Mexican claim pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the time it was ceded, and by our subsequent legislation." A review of the condition of things referred to proved a strong element of solution in developing

20 Otto 763

the true intent and meaning of the Act of Congress under consideration in that case.

We hold, in view of the condition of things notoriously existing in California in March, 1853, upon which condition of things in reference to the public lands this Act was designed to operate, that, by fair construction, this limitation is descriptive of three classes of land which are intended to be withheld from and do not pass by the grant: *First*—Those upon which there were settlements by the erection of dwelling houses, or the cultivation of any portion of the land. *Second*—Lands reserved by the Government for its uses. *Third*—Lands claimed under Mexican or Spanish grants; and that whenever at the date of the completion of the survey and the filing of the plat in the local Land Office any of the lands were within either of these three descriptions, other lands to an equal amount were granted in lieu thereof.

In **Sherman v. Buic** the Court described this limitation as "a qualifying limitation of the right of the State, which she was bound to recognize, when it was found to exist, and for which she was bound to seek indemnity in another quarter."

The land itself, which came within these de-

scriptions, was excluded from the grant. It was not the intention merely to protect the personal right of the settler, by withholding the lands, so long as he should maintain his position as a settler, nor of the private land claimant, so long as he was able successfully to maintain his claim, nor the Government itself, so long as it desired the use of lands reserved for any given purpose, and after these several objects were accomplished to have the lands so suspended *revert* to the State. In other words, these lands were absolutely excluded from the grant—not granted with qualifying conditions annexed to the title—which, when removed by the abandonment or failure of the settler, the failure of the Mexican grant claimant to establish the validity of his claim, the discontinuance by the Government of its reservation, made the title perfect. The fact that the lieu lands were granted, and that the State could select them immediately after the survey, repels every other theory of intention, except that for which we contend.

The Act of 1853 granted to the State by present grant a quantity of land equal to two sections in every township of public land in the State. The title attaches and becomes perfect to each 16th and 36th section the moment the location is ascertained by the survey. If, at the time of the

survey any of the above mentioned settlements, reservations, or private claims are found to exist upon such sections, the right of the State to such section then immediately ceases, and its right to take an equal quantity of other land at the same moment begins, and is then a vested right. It is incumbent upon the proper State authorities in such case to select such other lands, and upon such selection, the same being subject to the approval of the Secretary of the Interior, the title to the specific tract of such land so selected becomes perfect, and thus the grant is fully satisfied as to quantity.

The section excluded from the grant by reason of the settlement, reservation, or private claim described in the granting Act, continues in the same condition as before, to be dealt with by the Government in pursuance of existing laws which may affect the land, or other laws which may be passed in regard to such land. The State can have no reversion dependent upon the after events which may happen to such lands; no title dependent upon the caprice or fortune of the settler, who may or may not choose, or may or may not be able to comply with the requirements of the Government necessary to perfect into a complete title his inchoate right; no title dependent upon executive orders as to whether a reservation

for Indian or other purposes shall be continued or abandoned; no title dependent upon the results of litigation between the Government and private claimants. The right to take the lieu land is not suspended or held in abeyance during the course of these after events. It would be an impossible legal inconsistency to suppose that, after the right to take and select the lieu lands had intervened, and, presumably, had been exercised, it could so eventuate that the State would become vested with the title to the land, to compensate for the loss of which the right to the lieu land was acquired.

It is perhaps made a question on the adverse side in this case whether the Act of 1853 with respect to the 16th and 36th sections intended to exclude from the grants any settlements except such as were in a technical sense valid preëmption claims. The language employed is "any settlement by the erection of a dwelling house or the cultivation of any portion of the land." These are not the ready, apt, and usual terms for expressing the intention of protecting a homestead or preëmption claim. When Congress had that intention in making the grant to the Union and Pacific Railroads of July 1st, 1862, it described the reserved lands in these words: "to which a preëmption or homestead claim may not have

attached at the time the line of the road is definitely fixed," and in the additional grant to the same railroads, July 2d, 1864, it provi ed that the grant should "not defeat or impair any preëmption, homestead, swamp land, or other lawful claim."

It was notorious and was well known to Congress in 1853 that the State, especially the mineral belt, in which the lands in controversy are situated, was being rapidly filled with settlers who were not agriculturists, with whom cultivation of the lands occupied by them was merely incidental to the chief industry of mining; that the occupation of these settlers, though almost universally such as were incapable of meeting the requirements of the preëmption laws, were nevertheless such as developed the wealth and resources of the country, and should be protected. Congress was sensible that the condition of things were such that the State was not fully ready for the permanent application of the preëmption laws, and therefore it extended those laws to the State for one year only.

In protecting occupants of 16th and 36th sections, Congress clearly expressed the intention of extending that protection to others besides the qualified preëmptioner, of whom there were very few compared with the very numerous class of

settlers who lacked the qualifications of being heads of families, of citizenship, of intention to occupy as agriculturists, to inhabit as a home, etc., etc. In many locations a section would be covered with scores and hundreds of settlers occupying dwellings (cabins), cultivating, in many instances, small patches or a few acres of land, but following some other occupation as a chief means of livelihood. In such locations it was obviously impossible for any one to comply with the exacting conditions of the preëmption laws.

In describing the sections which it intended to exclude from the grant and give other lands "in lieu thereof," Congress intelligently and industriously avoided a description altogether too narrow in terms to meet the case, and adopted one broad enough, not only to protect the preëmption claimant, but every occupant whose occupation was evidenced by the erection of a dwelling house or the cultivation of any portion of the land.

Such was, we think, the view taken in **Sherman v. Buic**, where the Court says:

"Whether a settler on these school lands must have all the qualifications required by the Act of 1841, as being the head of a family, a citizen of the United States, etc., or whether the settlement, occupation, and cultivation must be precisely the same as required by that Act, we need not stop to inquire. It is very plain that by the 7th sec-

tion, so far as related to the settlement, it was sufficient if it was found to exist at the time the surveys were made which determined its locality; and as to its nature, that it was sufficient if it was by the erection of a dwelling house, or by the cultivation of any portion of the land. These things being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and being shown in the proper mode to the proper officer of the United States, the right of the State to that land was gone, and in lieu of it she had acquired the right to select other lands agreeably to the Act of 1826, subject to the approval of the Secretary of the Interior."

There might be room for theorizing against this construction, on the ground that by the liberality of the concession to every settler, instead of to the preëmptioner only, the object of the grant to the State for school purposes would, *pro tanto*, be defeated, were it not for the important factor of the grant of the lieu lands. This feature of the grant is of comparitively recent invention. By the Act of June 1st, 1840, (Lester, 54, 3d sec.) and by the Act of March 3d, 1843, (Lester, 85, 3d sec.) it was the settler on unsurveyed lands, ascertained upon survey to be school sections, who was required to take other lands in lieu thereof.

The language used in describing the lands for which other lands are to be taken differ widely in

different States and Territories. In Wisconsin lieu lands were granted where the school section "has been sold or otherwise disposed of." (7th sec. Act of Aug. 6th, 1846, Lester, 117.) In Iowa the same. (6th sec. Act March 3d, 1845, Lester, 108.) In Alabama, by the Act of February 26th, 1845, (Lester, 102,) lieu lands were allowed only for school sections embraced in Chickasaw land disposed of by treaty.

In Oregon, under the territorial laws, it was provided that "where the 16th and 36th Sections or any part thereof shall be taken and occupied under the law making donations of land to actual settlers or otherwise," other lands shall be taken. (Act of January 7th, 1853, Lester 194.) And in the Act admitting the State into the Union (Section 4, Act February 14th, 1859, Lester 305,) lieu land is granted "where either of said sections or any part thereof has been sold or otherwise been disposed of." By the Act of June 15th, 1844, (Lester 94,) it was provided in Florida, Iowa, and Wisconsin, that lieu lands were to be taken where the school sections were "included in private claims held by titles confirmed or legally decided to be valid and sufficient."

All these show that Congress, in legislating for California in 1853, had an intelligent regard for

the condition of the people in that State, and that it was not its purpose to save from the grant of the school sections valid existing preëmption claims alone, but also to protect a much more numerous and equally meritorious and valuable class of settlers, by excluding from the grant all lands upon which "any settlement, by the erection of a dwelling house or the cultivation of any portion of the land" existed at the time of the survey.

But if it be conceded that the true and only purpose of the 7th section of the Act of 1853 was to save the rights of such settlers as had before the survey acquired inchoate rights as preëmptioners, then the State title must fail, because the record in the case at bar shows that three or four valid inchoate preëmption rights evidenced by the erection of dwelling houses and cultivation of the land were upon and had attached to the school section upon which the lands in controversy are situated before the survey.

It is true that when the plat of the survey was filed in the District Land Office on the 16th of June, 1866, there was but one declaratory statement on file, that of John Hancock, and that no others were filed within three months after that date nor prior to the 28th of September, 1866, when the Register certified to the State Land

Office that no claim except the one mentioned had been filed to this 16th section.

It is true, also, that the 6th section of the Act of March 3d, 1853, requires generally of all claimants upon unsurveyed lands that they must file the "usual notice" within three months after the return of the plats to the Land Office. But it is well settled not only by the decisions of the Land Department but by this Court that the omission to file the notice does not work a forfeiture of the claim, because the Act of 1853 does not provide that forfeiture shall follow as a consequence of such omission, as did the Act of September 4th, 1841, (5 Stat. 457, Sec. 15), and the Act of March 3d, 1843, (5 Stat. 620, Sec. 5.)

Vide Johnson v. Towsley, 13 Wall. 72.
Schwerin v. Western Pacific R. R.
Opinion of Atty. Gen., Copps' Land Laws, 409.

By the Act of March 27th, 1854, (10 Stat. 269), no notice, declaration, or filing was required of settlers upon lands within the lateral limits of withdrawals for railroad purposes before survey and before the withdrawal. The settlements on this section were from 1853 continuously up to trial of this cause, and the record shows that the section was within the limits of the grants to the Central Pacific Railroad Company. The plaintiff

was the grantee of the railroad company of a portion of Section 21 adjoining Section 16, and through which the canal also ran, and was part of the premises sued for but not recovered. Section 21 being within the limits of the railroad grant, it follows that Section 16 adjoining on the north and still nearer the line of the road, must also be within such limits. Besides, it is a matter of which the Court may take notice that the withdrawals for railroad purposes always extend five miles wider on each side than the grant itself.

The meaning and effect of the Act of March 27th, 1854, in this respect was determined by the Land Department April 5th, 1854, by the "public notice" and instructions of the Commissioner of the General Land Office, (Lester, 376, No. 413,) by which settlers upon such lands were informed of their rights, and that "no declaration" was necessary in such cases.

The even-numbered sections within railroad limits were not restored to homestead settlement, preëmption, or entry, according to existing laws, until March 6th, 1868, by Act of Congress of that date. (Lester, 2d vol. p. 215.)

The first rules and regulations ever issued by the department requiring the settlers within railroad limits to file their declaratory statements

and proceed under the preëmption laws to perfect their titles, were issued March 22d, 1870.

July 14th, 1870, Congress passed an Act (16th Stat. 279) providing that nothing in the Act of March 27th, 1854, should be construed to relieve settlers on lands reserved for railroad purposes from obligation to file proper notices of their claims, as in other cases. The Act was prospective in its operation, and shows that Congress understood that such notice was not required by the law as it then stood. Such was the opinion of W. H. Smith, Assistant Attorney General, addressed to and approved by the Secretary of the Interior in February and March, 1872. (Copps' Land Laws, 412.)

In the same opinion which was adopted as the decision of the Secretary in Schwerin v. W. P. R. R., which was a case where the settler settled in 1853 on unsurveyed lands, which were surveyed in 1863, and did not file his declaratory statement until June 3d, 1870, the Attorney General says (after deciding the point that there was no forfeiture under the Act of 1853 by omission to file in three months):

"There is another view that may be taken of this case, and which leads to the same result. The Act of March 27th, 1854 (10 Stat. 269), provided that every settler upon public lands which

had been or should thereafter be withdrawn from market in consequence of proposed railroads, and who had settled prior to such withdrawal, should be allowed to preëmpt the land he had settled on and cultivated at one dollar and a quarter per acre, provided he should prove up his rights according to such rules and regulations as should be prescribed by the Secretary of the Interior, and pay for the lands before the day fixed by the President's proclamation for their restoration to market.

"As early as April 5th, 1854, an official construction was given to this Act, that it did not require the filing of any declaratory statement, and that proof and payment could be made at any time before the lands were restored to market by the President's proclamation. The first rules and regulations ever issued under it were issued on the 22d day of March, 1870. Those rules required that persons who had settled prior to withdrawal on unsurveyed lands withdrawn for railroad purposes and surveyed prior to March 22d, 1870, should file their declaratory statements with the Register within six months from the 1st of June, 1870. Now, on the 8th day of May, 1868, when the line of the railroad was definitely fixed, and when the right of the railroad would first attach to the lands in controversy, if it attached at all, Schwerin was within all the provisions of the Act of March 27th, 1854. He had settled in 1853 on unsurveyed lands; they were surveyed in 1863, and withdrawn for railroad purposes in 1865. He had filed no declaratory statement, because the proper department had ruled that no filing was necessary. As soon as a filing was required, he promptly complied. The regulation provided that it might be done at any time in six months after 1st June, 1870. He had filed

on 3d June, 1870. He was in time. He alleges that he desired to file long before he did, but the local officers informed him that it was not necessary. There is no proof of this allegation, but I have no doubt of its truth. The local officers were of the opinion that no filing was necessary, and that was the rule of their office." (Copp's Land Laws, 411.)

Vide, also, case of John Casson, Copp's L. L. 407; and

Herman v. West Wisconsin R. R. Co. Ibid, 415.

If, then, we regard the 7th Section of the Act of 1853 in the sense of protecting no other settlers than strict "preëmptioners," we must, at least, construe it as giving the protection to such as had rights under the preëmption laws and regulations existing at the date of the survey.

If it was the intention to withhold from the grant those sections only to which at the date of survey a preëmption right had attached, such intention, even though it did not go to the extent of withholding the land itself from the grant, but to the extent only of protecting the personal right of the settler to afterwards perfect his claim in pursuance of existing laws (suspending the operative force of the grant in the meantime) would be absolutely contravened and defeated if the Register could transfer the title to the State by certifying at the expiration of three months from the

filing of the plat that no person had filed a pre-emption claim to the land.

With laws in existence exempting actual settlers before survey from the necessity of such filing no such result could follow such act of the Register. It could follow only in case the law applicable to the particular case imposed an absolute forfeiture as the consequence of not filing in three months, and this we have shown was not the case even under the three months' provision of the Act of 1853.

The certificate of the Register in this case, so far as having any operative effect upon the title was concerned, was *ultra vires*. The Register was not entitled by law to notice of the claims of settlers by having declarations filed in his office. He had the plats, upon which the law required such objects as houses, fences, cultivated lands, and other improvements, existing at the time of the survey in the field, to be noted by the field surveyors; and it must be presumed that these objects were so delineated on the plat, as in fact they were in this case; and this, under the law, was sufficient to protest his right, sweepingly, to certify to the State all sections upon which notices in the nature of declaratory statements were not filed in his office. His certificate, to have any legal force, if under any circumstances it could

have any legal effect upon the title, should have conformed to the law by certifying, in addition to the fact that no declaratory statements except John Hancock's were filed in his office, the further fact that no settlements by dwelling houses or cultivated lands were exhibited upon the plats of survey on file in his office.

The Registers of the Land Offices have, in some instances, certified to the railroads odd-numbered sections, which did not at the date when the line of the roads were definitely located show preëmption filings in their offices, and in some cases the railroads have obtained patents for such lands. The Land Department has invariably disregarded these claims of the railroads, and held that where an inchoate preëmption right existed at the time the line of the road was definitely located, the title did not pass to the railroad, even though the inchoate right should never be perfected, or, in fact, should afterwards be abandoned.

Boyd v. Burlington and Mo. River R. R., reported in Western Land Owner, June, 1874, where W. H. Smith, Assistant Attorney General, says: "If the homestead claim has attached at the time the line of the road is definitely located, then the railroad is excluded. It would seem to be immaterial what becomes of the claim after that, whether it was perfected or abandoned."

Fitzgerald v. W. P. R. R. Co., Copp's L. L., July, 1875, p. 51. Preëmption claim not forfeited for not filing, quoting Johnson v. Towsley, 13 Wall. 72, and Duffy v. Northern P. R. R., reported in same book on same page, where it is ruled on the authority of Johnson v. Towsley, that "a settler who fails to file his declaration within the prescribed time, but before any valid adverse *settler's* claim shall attach, is still within the law, and no forfeiture is incurred (quoting Johnson v. Towsley); and further, "that the adverse claim of a railroad, under a grant in the usual terms, does not take a case out of the general rule as above recited, nor is it within the letter or spirit of the exception noted by the Court."

There are numerous other cases to the same effect which might be cited.

As to the Particular Time when the Title Passes to the State.

Where the section is vacant and free from settlements, unquestionably the title passes to the State the moment the survey is made, and the survey is made the moment the United States Surveyor General approves the plat in his office.

But when does the title pass in cases where there are settlements of the kind which may be perfected into titles under the preëmption laws,

limiting the inquiry for the present to such settlements only as are strictly within existing laws?

This inquiry is important in this case in view of the fact that the rights of the canal company were confirmed on the 26th of July, 1866, *sixty-four days before the lands were certified to the State.*

Was the title then in such a condition that the Government had control over it?

We claim that it was.

It will be admitted that, if the Act of July 26th, 1866, had been passed a year earlier, or any time before the survey, it would have been effectual to save the rights of the canal company. Why? Because the Government retained some control of the lands up to time of survey, and this because, although the grant was made in 1853, it did not attach to specific tracts until the survey. In the meantime, during the interval between the date of the grant and the date of the survey, the Government was dealing in such manner as to its policy seemed best with settlements; and, whatever that dealing might be, the State suffered no injury by reason of the grant of the lieu lands.

With respect to the lands to which inchoate preëmption rights existed at the date of survey, the State title did not attach to them at that time.

We have endeavored to show that it could not afterwards attach to them; but, keeping that out of view now, it is clear that the State title, if it attaches at all to such lands, does not attach until such inchoate right is removed or extinguished, and that during the time of the life of such inchoate right and until it is extinguished, until which time the rights of the State do not become absolute, the Government retains the same control over the land that it did prior to the survey. If, during this period of control, the Goverment could not confirm and acknowledge the rights which it undertook to do by the Act of July 26th, 1866, it could not have confirmed them during the prior period intervening between the grant and the survey. If the doctrine of relation can be made to apply so as to make the State title relate from the time when the inchoate preëmption right is finally annulled to the date of survey, why cannot it, with equal propriety, be made to relate to the date of the grant, and thus cut off the right of Government control from the beginning?

The Act of 1853 required the preëmption claimant upon unsurveyed lands to file his declaratory statement "within three months after the return of the plats of surveys to the Land Offices." The plat in this case was returned on the 16th of

June, 1866. At this time there were, and for a long time anterior to the survey in the field, had been, upon this 16th section, the several settlements mentioned in the record. All of these settlements were by the erection of dwelling houses or the cultivation of the land, except that of the canal company, and were such as could have been perfected into titles under existing laws; conceding, for the purposes of this case, that the right of a settler upon school sections before survey would be forfeited by his not filing the usual notice of his claim within three months after the return of the plat, we claim that the right of the State would not attach until such forfeiture took place. There was no formal or other abandonment on the part of any of the settlers prior to the 26th of July, the date when the rights of the canal company were confirmed. If the failure to file a declaratory statement amounted to an abandonment, such abandonment would not date earlier than the 16th of September.

Bugbey, the defendant in error, who was a settler, with all the rights of a preëmptioner, did not abandon during the three months, nor after, until in 1867, when he purchased of the State. As a preëmptioner he bore certain relations to the Government—none to the State; and the Government bore certain relations to him; and the

Government had certain rights in the matter of dealing with this land as between it and the State, growing out of the fact that Bugbey was a pre-emption settler on the land before survey. If Bugbey had pursued his right, which was a vested inchoate right, he would have taken 160 acres of land of the Government, subject to the easement of the canal, sanctioned by the Act of July 26th. It may, we submit, be pertinently asked, if the condition of the title at the date of the survey was such that a tenant of the Government by sufferance, who had enjoyed the land for many years, could, at his option, either during the three months, or after, or any time, control the title, so as to deprive the Government of its control.

If the land had been wholly free from all kinds of settlements or occupation, except that of being traversed by the canal, and the Act of July 26th had been passed before the survey, the State would have had to take the land subject to the easement, or not take it all.

If it be true, then, and the adverse side rests on this theory, that when the land truly comes within the limitation of the 7th section, the State title attaches to the specific tract, upon, and because of the abandonment, failure, or lapse of the preëmption right which may have been attached to it, it will follow that the title, when it does

inure to the State, if it ever so inures, comes with the same easements annexed which the Government had the right to impose, and did, in this case impose, while the land was still in a condition in which none had any concern with it, except the Government and the preemptioner.

Bugbey settled upon this 16th section in 1861, when he succeeded Hardesty, who settled in 1853. (18th Finding.) His predecessor, as well the other settlers, used water from the canal for irrigation as far back as 1853. (12th Finding.) In the language of the 16th Finding, Bugbey "ever since he went upon the premises adjoining said canal in the year 1861 or 1862, has purchased water from said canal for irrigating the lands along and adjoining said canal till within two years last past, and until his application for a patent for the lands in controversy in Section Sixteen always recognized and acknowledged defendant's right to, and ownership and possession of, said canal and the lands in controversy herein."

From this it will appear that he settled prior to withdrawal for railroad purposes, and was within the Act of March 27th, 1854, and the rules and regulations thereunder. As a settler before survey, within the meaning of the 7th section of the Act of 1853, he could purchase of the Government 160 acres at $1 25 per acre, subject to

the easement confirmed to the canal; and this was his right which the Government was under moral though, perhaps, not under legal obligation. to recognize. It is true that he was under no obligation to pursue his right; yet, he could not, by not pursuing it, relieve the land of a servitude lawfully and irrevocably imposed upon it, especially for the purpose of getting the title from the Government through an intermediate source free of such servitude.

Abandoning his rights under the Government, in 1867, as we contend, but not in any aspect of the case prior to 26th of July, 1866, he purchases of the State, at $1 25 per acre—(not $2 50, as inadvertently stated in the supplementary brief of his counsel, **vide 2d sec. Act of April 27th, 1863**, under which the purchase was made, **Stat. of Cal. 592**,)—and seeks thereby to acquire title to the bed of defendant's canal, and destroy a property which for sixteen years before that time had enjoyed the license and encouragement of both State and National Governments, and over which and all other like property the latter, on the 26th of July, 1866, threw its impenetrable shield of confirmation.

II.

The Effect of the Confirmation of July 26, 1866.

We claim that the plaintiff in error had an

estate in the right of way for its canal, by reason of its long possession; the long acquiescence of both State and National Governments; the recognized policy of both; the active recognition and protection of the one and the politic and intentioned non-interference of the other, under which and by the encouragement and implied consent of which, during long years, both before and subsequent to the Act of 1853, vast private properties were created which subserved the revenues and interests of the Government, and advanced the prosperity of its people.

What the exact nature and quality of this estate was—how to define its precise boundaries—is not necessary to consider, further than to ascertain whether, under recognized principles, it was of sufficient substance to be the subject of a confirmation by the paramount proprietor.

The principal requisites of a good confirmation are the following:

"First—There must be a good confirmer and a good confirmee, and a thing to be confirmed, as in other grants.

"Second—That there be a precedent rightful or wrongful estate in the confirmee, in his own or another's right; or at least he must have *possession* of the thing which is to be confirmed to him, or a foundation for the confirmation to work upon."

2 Bouv. Inst. sec. 2072, page 417.

"A confirmation is the conveyance of an estate or right that one hath in or unto lands or tenements to another that hath the *possession thereof or some estate therein.*"

Shep. Touch. 311.

The plaintiff in error has been in the absolute, exclusive, and quiet possession of the premises in controversy, with some estate therein, from 1851 until the present time; never questioned by any public authority, nor by any private person, but recognized, acquiesced in, and assented to by all, until this action was commenced, in 1868.

Plaintiff in error claims that its right attached in 1851, when its canal was laid out, surveyed, and its construction commenced (2d Finding,) upon vacant public lands of the Government; that it was constructed under license of the United States, and when constructed became an executive license.

2 Greenleaf on Ev. 475.

2 Starkie on Ev. 540, 2d Am. Ed.

PRESUMPTION OF A GRANT OR LICENSE.

The short time within which this petition must be prepared, will not permit such an examination of this question as its importance and its pertinency to this case warrants.

In Conger v. Weaver, 6 Cal. 555, HEYDENFELDT, Justice, presents the principles involved so

clearly, that we beg leave to quote from the opinion in that case, at some length :

"One of the favorite and much indulged doctrines of the common law, is the doctrine of presumption. Thus, for the purpose of settling men's differences, a presumption is often indulged where the fact presumed cannot have existed. In support of this position, I will refer to a few eminent authorities. In **Eldridge v. Knott, Cowper 215,** Lord Mansfield says : 'Lord Coke says somewhere that an Act of Parliament may be presumed, and of late it has been held that even in the case of the Crown, which is not bound by the statutes, a grant may be presumed from great length of possession. It was so done in the case of the corporation of Hull and Horner ; not that in such cases the Court really thinks such a grant has been made, because it is not probable a grant should have existed without its being on record, but they presume the fact for the purpose and from a principle of quieting the possession.'

"See, also, **Goodtitle v. Parker, 11 East.**, and **Granger v. Scott, 6 Man.**

"In these cases presumptions were indulged against the truth—presumptions of Acts of Parliament and grants from the Crown. It is true the basis of the presumption was length of time, but the reason of it was to settle the dispute and to quiet the possession. If, then, lapse of time requires a Court to raise presumptions, other circumstances, which are equally potent and persuasive, must have the like effect for the purposes of the desired end ; for lapse of time is but a circumstance or fact which calls out the principle, and is not the principle in itself.

"Every Judge is bound to know the history and the leading traits which enter into the his-

tory of the country where he presides. This, we have held before, and it also is an admitted doctrine of the common law. We must, therefore, know that this State has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative portion of its land had been granted to private individuals; that the great bulk of it was land of the Government; that but little, as yet, has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously from a period anterior to the organization of the State Government to the present time: upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes, and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted watercourses; and, indeed, have done, in the various enterprises of life, all that is usual and necessary in a high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the Courts who have to apply the law in reference to them, but also the Government of the United States, which claims to be the proprietor of these lands, and the Government of the State within whose sovereign jurisdiction they exist. In the face of these notorious facts the Government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the State.

"The State Government has not only looked on quiescently upon this universal appropriation of public domain for all of these purposes, but has studiously encouraged them in some instances, and recognized them in all.

"Now, can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the doctrine of presumption of a grant of right, arising either from the tacit assent of the sovereign or from expressions of her will in the course of her general legislation, and indeed from both.

"Possession gives title only by presumption; then when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption for a license to occupy from the owner will be presumed.

"In the case of **Hicks v. Bell, 3 Cal. R.**, speaking of this State's ownership of her gold mines, this Court said: 'In her legislation upon this subject she has established the policy of permitting all who desire it to work her mines of gold and silver, with or without conditions.'

"Yet there was not at that time, nor has there been since, any Act of the Legislature directly conferring the privilege of working the mines, except in cases of foreigners, who were required to obtain and pay for a license to do so.

"How, then, was the permission derived? The answer is evident. Her general legislation, looking at the existence of this state of things, and referring to it, necessarily presumed a license—a license to every one who chose to possess himself of the franchise.

"Now, also, ever since the organization of this State, among the other various enterprises which have been undertaken upon the public lands, is that which is brought in question in the case before us—the construction of ditches, flumes, and canals—for the purpose of conducting water from their natural channels to supply the wants of gold miners.

"In like manner, as in other pursuits, the State Government has looked on the progress of these works for the past seven years, until their extent has reached hundreds of miles, and every important stream in the State has been tapped by them; has referred to them in various legislative Acts; and has annually made them the subject of revenue to the State.

"In **Irwin v. Philips, 5 Cal. R.** we canvassed the action and non-action of the State upon this subject, and derived from her course, by the rule of presumption, a positive right in the constructors and owners of these works, to hold and enjoy them as property—a vested right which cannot be taken away.

"In that and several subsequent cases we have recognized their right to appropriate the water—to divert it from its natural channel—where no riparian rights intervened, and to be protected in its use, in its pure and natural condition, against all subsequent efforts to divert or injure it."

In the case of **Merced Mining Co. v. Fremont. 7 Cal. 326**, the Court said:

"When we consider the current and the spirit of the legislation of both, taken in connection with the history and known circumstances of the country, the conclusion is irresistible, that the mines are occupied and worked with the clear assent and encouragement of both Governments; and while the terms of this license and the relation which the miner sustains to the superior proprietor may not be expressly laid down, and the duration of the estate not clearly designated by any positive law, and we may not for these reasons be able to give any exact definition of the precise nature of the right; yet one thing is well understood and indisputable, they are there by the clear license of both Governments, and have

such a title as will hardly be divested even by an act of the superior proprietor."

It is obvious that the above is equally, and indeed with more force, applicable to canals constructed to supply water for mining purposes.

In the case of **Northern R. R. Co. v. Gould, 21 Cal. 254.** the Court sustained a naked occupation against a congressional grant.

From the syllabus of the case:

"A settler upon the public lands in this State having no other title than that of occupancy, cannot consistently with the policy of the General Government and of the State, in reference to such lands, be treated by the Courts as a naked wrongdoer; as against persons claiming a simple privilege like that conferred upon railroad companies by the Act of Congress of August, 1852, he has an equitable right to his possession and improvements which the Courts will protect."

In **Leavenworth, Lawrence and Galveston R. R. Co. v. United States,** and in **Newhall v. Sangar,** this Court recognizes the general principle, that it will be presumed that Congress, in making donative grants, did not intend to grant any lands but such as were vacant public lands, free from claims, such as the Government may by its policy have encouraged, or may wish to protect.

The presumption is irresistibly strong, that Congress in the donation of the 16th and 36th sections and lands in lieu thereof to California, in-

tended to *unconditionally* withhold from the grant such of the lands as were settled upon and improved, with the view of itself dealing with the occupants of such sections, in accordance with the liberal spirit of its public policy, upon which the people have learned to rely, and upon which the early settlers in California were compelled to rely. A flouring mill, with its water power, erected upon public land prior to March 3d, 1853, is not within the letter of the limitation contained in the 7th section; as it was neither a dwelling house nor a cultivation of the land. Yet it cannot be presumed that Congress, by the Act of 1853, intended to grant away the lands upon which such properties, or properties such as that of the plaintiff in error, were established at the time, or might be prior to the survey of the lands.

The 9th section of the Act of July 26th, 1866, is of the utmost significance in showing what Congress intended from the beginning. It then confirmed the "rights to the use of water for mining, agricultural, manufacturing, or other purposes," which for sixteen years it had tolerated, recognized, and encouraged.

Respectfully submitted.

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